No. 93-817

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE BOEING COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA
ex rel. KEVIN G. KELLY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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143PP

QUESTION PRESENTED

Does the Constitution permit Congress to authorize private citizens who have suffered no injury to litigate civil fraud claims on behalf of the United States?

PARTIES TO THE ACTION

Plaintiff

Kevin G. Kelly

Defendant

The Boeing Company

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.1, Petitioner The Boeing Company discloses that it is a corporation incorporated in the State of Delaware. Petitioner has no parent company or subsidiaries (except wholly-owned subsidiaries).

STATEMENT REGARDING THE UNITED STATES

Pursuant to Supreme Court Rule 29.4(b), Petitioner states that 28 U.S.C. § 2403(a) may be applicable. It does not appear that the courts below made a certification pursuant to § 2403(a), but the district court noted that the Attorney General was to be served with copies of all pleadings pursuant to 31 U.S.C. § 3730(c)(3). Pet. App. 77a.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, dated November 5, 1993, is not yet reported, but is reproduced at pages 1a-34a of the appendix to this petition ("Pet. App."). The circuit court's original opinion, which was filed on September 7, 1993, is reproduced at Pet. App. 35a-73a. The unreported opinion and order of the United States District Court for the Western District of Washington, dated June 3, 1992, is reproduced at Pet. App. 74a-83a. The district court's Order Certifying Interlocutory Appeal, dated June 22, 1992, which also is not reported, is reproduced at Pet. App. 84a-87a. The unreported order of the court of appeals granting permission for interlocutory appeal is reproduced at Pet. App. 88a.

JURISDICTION

The original opinion of the United States Court of Appeals for the Ninth Circuit was issued on September 7, 1993, and the amended opinion was issued on November 5, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the United States Constitution: Article II, including its Vesting Clause, the Appointments Clause, and the Take Care Clause; Article III, including its Vesting Clause and the Case and Controversy Clause; and the Due Process Clause of the Fifth Amendment. These provisions are reproduced at Pet. App. 89a-90a. The case also involves the principle of separation of powers, which is reflected throughout the Constitution.

The statute involved in this case is the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, relevant portions of which are reproduced at Pet. App. 90a-99a.

STATEMENT OF THE CASE

A. The Statutory Scheme

The False Claims Act prohibits a variety of fraudulent practices in dealings with the federal government, and provides for a civil penalty of $5,000 to $10,000 for each false claim, plus treble damages. 31 U.S.C. § 3729(a). The statute authorizes civil enforcement actions by the Attorney General. *Id.* § 3729(a). The statute also authorizes private individuals, who are sometimes known as relators, to "bring a civil action for a violation of [the Act] for the person and for the United States Government." *Id.* § 3730(b)(1).

The Act specifies certain procedures with respect to *qui tam* suits brought by private persons. The relator's complaint must be filed *in camera,* where it remains under seal for at least 60 days. During that time the Government must determine whether to enter the action. *Id.* § 3730(b)(2). If the Government decides not to intervene, the lawsuit nevertheless proceeds with the relator conducting the litigation. *Id.* § 3730(b)(4).

If the Government takes over a *qui tam* action under this statute, it has primary responsibility for the prosecution. *Id.* § 3730(c)(1). Even after such intervention, the relator continues to be a party to the action, and his participation may be limited only by order of the court. *Id.* §§ 3730(c)(2)(C)-(D), 3730 (c)(4). As an intervenor, the Government may dismiss or settle the litigation over the objections of the relator, but only with court approval. *Id.* §§ 3730(c)(2)(A)-(B).

Whether or not the Government joins the litigation, the relator is entitled to a portion of the proceeds if the prosecution is successful. In cases where the Government participates, the relator receives no less than 15 percent and no more than 25 percent of any award or settlement. *Id.* § 3730(d)(1). When the Government does not join, the relator's minimum share is 25 percent and may be as much as 30 percent, plus attorney's fees and expenses. *Id.* § 3730(d)(2).

B. The Proceedings Below

Kevin G. Kelly, a former Boeing employee, filed the original complaint in this action under seal in the United States District Court for the Western District of Washington on November 30, 1989. The complaint alleged various violations of the False Claims Act involving Boeing's lease of facilities used in connection with its work on two government contracts—the B-2 Bomber and the Advanced Tactical Fighter. Pet. App. 2a.

The Government conducted an extensive investigation of the allegations against Boeing, which lasted for 40 months and included the review of more than 400,000 pages of documents. On July 31, 1991, after completing its investigation, the Government filed notice of its election not to intervene in Kelly's action. Pet. App. 2a.

The district court thereupon unsealed the case, and Kelly filed a First Amended Complaint. Boeing moved to dismiss that complaint on the basis of the constitutional question presented in this petition. The district court denied Boeing's motion and subsequently amended its order pursuant to Fed. R. App. P. 5(a) to permit Boeing to seek an interlocutory appeal of the constitutional question. Pet. App. 3a, 84a-87a.

On August 26, 1992, the court of appeals granted permission to appeal and thus acquired jurisdiction pursuant to 28 U.S.C. § 1292(b). Pet. App. 88a. After briefing and argument, the court on September 7, 1993, rejected Boeing's constitutional arguments and affirmed the district court's order. Pet. App. 35a-73a. On November 5, 1993, the court issued an amended opinion which eliminated part of the court's rationale for upholding the standing of the *qui tam* relator but which was otherwise identical to the original opinion. Pet. App. 1a-34a.[1]

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[1] This case was argued and submitted to the court of appeals at the same time as *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827 (9th Cir. 1993). In that case, General Dynamics

REASONS FOR GRANTING THE WRIT

Until recently, *qui tam* litigation was viewed as a rare anachronism. Since the adoption of the False Claims Act Amendments of 1986, however, such litigation has mushroomed and prompted a wide-ranging constitutional debate. Former Attorney General William P. Barr, while serving as Assistant Attorney General for the Office of Legal Counsel, authored a lengthy opinion concluding that the *qui tam* provisions of the False Claims Act are unconstitutional.[2] Scholarly comment on these issues has been extensive and divided.[3]

The debate over the constitutionality of *qui tam* statutes urgently requires resolution by this Court. Over 600 *qui tam* cases, many of them wasteful and unmeritorious, have been filed since the 1986 Amendments, imposing an escalating burden on the lower courts, the Government, and parties such as Boeing. An emerging *qui tam* plaintiff's bar has pressed such suits in industries as diverse as health care, nuclear power and scientific research, and Congress is considering measures to expand its use even further. The attempt by federal courts to articulate a constitutional basis for *qui tam* litigation has led to con-

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also challenged the constitutionality of the *qui tam* provisions of the False Claims Act, although it did not raise an argument based on the Due Process Clause. The court of appeals rejected General Dynamics' constitutional arguments without discussion, referring to its opinion in the instant case. *Id.* at 829. We understand that General Dynamics is filing a petition for certiorari.

[2] *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Opp. Off. Legal Counsel 249 (1989).

[3] *See, e.g.*, Frank A. Edgar, Jr., Comment, *"Missing the Analytical Boat": The Unconstitutionality of the Qui Tam Provisions of the False Claims Act*, 27 Idaho L. Rev. 319 (1990); Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341 (1989); Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. Chi. L. Rev. 543 (1990); Valerie R. Park, Note, *The False Claims Act, Qui Tam Relators, and the Government: Which is the Real Party to the Action?*, 43 Stan. L. Rev. 1061 (1991).

fusion of settled constitutional principles, particularly in the area of standing.

At least ten district courts and two courts of appeals have issued opinions sustaining the constitutionality of this statute, but their opinions have disagreed on a number of the specific issues if not on the result.[4] This Court has never ruled on these issues, although it has noted the potentially anomalous position of the *qui tam* lawsuit in the course of deciding a variety of constitutional questions.[5]

This is the first petition for certiorari to raise these issues.[6] This is a substantial constitutional question that has not been, but should be, decided by this Court.

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[4] *United States ex rel. Kreindler & Kreindler v. United Technologies Corporation*, 777 F. Supp. 195 (N.D.N.Y. 1991), *aff'd*, 985 F.2d 1148 (2nd Cir.), *cert. denied*, 113 S. Ct. 2962 (1993); *United States ex rel. Robinson v. Northrop Corporation*, 824 F. Supp. 830 (N.D. Ill. 1993); *United States ex rel. Burch v. Piqua Engineering, Inc.*, 803 F. Supp. 115 (S.D. Oh. 1992); *United States ex rel. Kelly v. The Boeing Company*, No. C. 89-1732R (W.D. Wash. June 3, 1992), *aff'd*, No. 92-36660 (9th Cir. Sept. 7, 1993); *United States ex rel. Givler v. Smith*, 775 F. Supp. 172 (E.D. Pa. 1991); *United States ex rel. Madden v. General Dynamics Corp.*, No. CV 88-5352 WMB (C.D. Cal. Nov. 27, 1991), *aff'd*, 4 F.3d 827 (9th Cir. 1993); *United States ex rel. Truong v. Northrop Corporation*, 728 F. Supp. 615 (C.D. Cal. 1989); *United States ex rel. Newsham v. Lockheed Missiles and Space Co.*, 722 F. Supp. 607 (N.D. Cal. 1989); *United States ex rel. Stillwell v. Hughes Helicopters*, 714 F. Supp. 1084 (C.D. Cal. 1989); *Hyatt v. Northrop Corp.*, No. CV 87-6892 KN (C.D. Cal. Dec. 27, 1989). *See also United States ex rel. Yellowtail v. Little Horn State Bank*, 828 F. Supp. 780, 785-86 (D. Mont. 1992) (affirming standing of relator under 25 U.S.C. § 81).

[5] *See Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2143 (1992); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.21 (1989); *United States v. Halper*, 490 U.S. 435, 451 (1989).

[6] The petition in *Kreindler*, *supra* note 4, was filed by the plaintiff and did not raise any constitutional issue.

I. THERE IS A SUBSTANTIAL QUESTION ON THE CONSTITUTIONALITY OF THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT.

A. The History of *Qui Tam* Litigation Does Not Resolve the Constitutional Question.

The historical record does not validate the constitutionality of *qui tam* litigation by private plaintiffs who have suffered no injury. Such *qui tam* litigation has always been a sort of legal curiosity and was never imbedded into the structure of federal law. Thus the factors that have caused this Court to give decisive weight to historical practice in some constitutional cases do not apply. *Cf. Marsh v. Chambers*, 463 U.S. 783 (1983).[7]

1. *The English Experience*

In the thirteenth century, the jurisdiction of the royal courts of England was largely restricted to matters involving the king. Private parties desiring access to the royal courts would occasionally plead that they were seeking redress, not only for their own grievances, but also for an injury to the king's interests. This pleading phrase, "*qui tam pro domino rege quam pro se ipso*," gave rise to what is now generally referred to as the *qui tam* lawsuit.[8]

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[7] The court below and most of the other courts to consider this question have agreed that the historical record is not sufficient to sustain the constitutionality of *qui tam* litigation. Pet. App. 34a n.23; *Burch*, 803 F. Supp. at 117. *See also Truong*, 728 F. Supp. at 618 (noting "tenuousness" of historical argument for qui tam's constitutionality); *Yellowtail*, 828 F. Supp. at 785-86 (affirming standing of *qui tam* relator suing under provisions of 25 U.S.C. § 81 and noting that "*Truong* correctly declined to find too much in the *qui tam* historical argument"). *But see Newsham*, 722 F. Supp. at 615 (noting "heavy reliance on *qui tam* actions by the First Congress").

[8] The discussion in this section of the petition draws largely upon Note, *The History and Development of Qui Tam*, 1972 Wash. U. L.Q. 81 (1972). *See also* Dan D. Pitzer, *The Qui Tam Doctrine: A Comparative Analysis of Its Application in the United States and the British Commonwealth*, 7 Texas Int'l L.J. 415 (1972); Robert W. Fischer, Jr., *Qui Tam Actions: The Role of the Private Citizen in Law Enforcement*, 20 UCLA L. Rev. 778 (1973).

Common law *qui tam* litigation died out after the jurisdiction of the royal courts was expanded in the fourteenth century, but it was succeeded by a number of statutes that authorized private parties to bring suit on behalf of themselves and the Crown. These statutory *qui tam* actions permitted victims and informers to sue for violation of the statute and recover a share of the penalty.[9]

It should be recognized that statutory *qui tam* litigation in England was often, and perhaps primarily, criminal. This was scarcely odd, since most criminal prosecutions prior to the nineteenth century were private in nature, generally brought by the victim.[10] During this period, the government did not have a large force of police or prosecutors. It was necessary to rely upon the private initiative of victims and informers to obtain enforcement of the laws.

The growth of *qui tam* litigation in England following the fifteenth century engendered a certain amount of controversy. Informers engaged in a variety of abusive practices, including the initiation of collusive lawsuits to preclude later prosecution and the bringing of frivolous actions for purposes of harassment. Lord Coke referred to common informers as "venomous vipers."[11] A number of legislative and judicial measures were taken to reduce the amount of *qui tam* litigation and control the conduct of informers. *Qui tam* litigation gradually declined during the eighteenth and nineteenth centuries and was formally abolished by Parliament in 1951.[12]

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[9] *See, e.g.*, Statute Prohibiting the Sale of Wares after Close of Fair, 5 Edw. 3, c. 5 & 6 (1331). Some *qui tam* statutes authorized suits only by injured parties. *See, e.g.*, A Remedy For Him Who Is Wrongfully Pursued in Admiralty Court, 2 Hen. 4, c. 11 (1400) (authorizing a party improperly sued in admiralty court to recover double damages plus a fine, payable to the king, of ten pounds).

[10] *See* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 276, 290-91 (1989).

[11] 4 Sir William S. Holdsworth, *A History of English Law* 356 (2d Ed. 1937).

[12] Common Informer's Act, 14 & 15 Geo. 6, c. 39 (1951).

2. *The American Experience*

The American colonies inherited *qui tam* litigation along with other English legal practices of the seventeenth century, including the private prosecution of crimes. These practices were carried over by the newly-independent states.[13] However, the *qui tam* device never played a substantial role in American legal practice and its use rapidly disappeared after the early nineteenth century. Most states soon came to regard the prosecution of crimes and the redress of public injuries to be exclusively the responsibility of government prosecutors and attorneys.

At the Federal level, some *qui tam* statutes were passed by early Congresses. These statutes appear to have been unthinkingly carried over from English and Colonial experience, without any consideration of whether such litigation was consistent with the newly-adopted Constitution. One of the principal features of the Constitution, the tripartite separation of powers, was a marked departure from the governmental structure of England and the Colonies.

It is also unclear how often these new *qui tam* statutes were used or could be used by private informers who had suffered no injury. For example, the first copyright act has been cited as a *qui tam* statute, but it provided for the statutory penalty to be divided between the government and the author of the copyrighted material.[14] Other supposed *qui tam* statutes enacted by the First Congress provided rewards for informers without authorizing them to bring suit.[15] In some situations, it appears that *qui tam* statutes were used primarily to compensate government

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[13] *See* Krent, *supra* note 10, at 291-93.

[14] Act of May 31, 1790, ch. 15 § 2, 1 Stat. 124, *cited in Stillwell*, 714 F. Supp. at 1086 n.2.

[15] *E.g.*, Act of Sept. 2, 1789, ch. XII, § 8, 1 Stat. 65, 67 (penalties imposed on Treasury officials for violating provisions of the Act to be shared with informers); Act of March 3, 1791, ch. VIII, § 1, 1 Stat. 215 (extending same). *See Truong*, 728 F. Supp. at 617 n.3; *Stillwell*, 714 F. Supp. at 1086 n.2.

officials who at that time were often not full-time salaried employees.[16]

In any event, whatever use was made of the *qui tam* device in the early years of the Republic, it quickly fell into desuetude. Apart from the False Claims Act of 1863, which was passed at a time of national emergency, federal *qui tam* statutes have been rarely-used oddities for nearly 200 years.[17]

B. This Court Has Never Decided Whether the *Qui Tam* Device is Constitutional.

This Court has decided only a handful of *qui tam* cases, none of which presented the question of whether it is constitutional for a private citizen who has suffered no injury to litigate on behalf of the United States.[18] In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), this Court interpreted the *qui tam* provisions of the False Claims Act to permit suits by relators based on

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[16] A survey of 70 informer suits brought on the eve of the Revolution showed that 67 were brought by government officials and only one by a private informer who had suffered no injury. L. Harper, *The English Navigation Laws* 170 (1939).

[17] In addition to the False Claim Act, it appears that only four other federal *qui tam* statutes currently are in force: 18 U.S.C. § 962 (forfeitures of vessels privately armed against friendly nations); 25 U.S.C. §§ 81 & 201 (recovery of penalties for violation of Indian protection laws); 35 U.S.C. § 292 (penalties for patent infringement); and 46 U.S.C. § 723 (forfeiture of vessels taking undersea treasure from the Florida coast to foreign nations).

It should be noted that, notwithstanding similarities in the captioning of the cases, *qui tam* actions do not include all actions brought by private parties in the name of the United States, such as the Miller Act. *See* 40 U.S.C. § 270b(b).

[18] Indeed, a number of these cases, including *McCulloch v. Maryland*, were brought under state statutes and thus did not involve the same separation of powers concerns as presented by a federal statute. In *McCulloch*, the plaintiff was also a government official and not a private citizen. 17 U.S. (4 Wheat.) 316 (1819). In another leading case, the plaintiff was a victim and not a disinterested informer. *Marvin v. Trout*, 199 U.S. 212 (1905) (suit under state *qui tam* statute to recover husband's gambling losses).

information in the possession of the Government. This decision was based on the plain language of the statute. No constitutional issue was raised or decided by the Court. In the fifty years since *Marcus,* this Court has not decided any *qui tam* cases.

C. There Are Substantial Reasons to Believe That the *Qui Tam* Provisions of the False Claims Act Are Unconstitutional to the Extent They Confer Standing on Parties Who Have Not Been Injured.

1. *Standing*

The attempt to manufacture a constitutional basis for *qui tam* litigation has required federal courts to distort the carefully-crafted standing jurisprudence laid out in this Court's opinions. A score of decisions over the past two decades have clearly outlined the minimum constitutional requirements for Article III standing: (i) individual and particularized injury-in-fact to the plaintiff, (ii) which was caused by the conduct challenged in the lawsuit, and (iii) which will be redressed if the plaintiff prevails.[19]

Qui tam suits by uninjured relators represent an exception that swallows these basic standing principles. Indeed, the Court's standing doctrine has been widely criticized by academicians, many of whom argue that it is inconsistent with *qui tam* litigation which they presume to be constitutional.[20] This Court itself has indicated, without explanation, that *qui tam* relators may not be

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[19] *See, e.g., Warth v. Seldin,* 422 U.S. 490 (1975); *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464 (1982); *Allen v. Wright,* 468 U.S. 737 (1984); *Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130 (1992). *See generally* John G. Roberts, Jr., *Article III Limits on Statutory Standing,* 42 Duke L.J. 1219 (1993).

[20] *See, e.g.,* Raoul Berger, *Standing to Sue in Public Actions,* 78 Yale L.J. 816, 839-40 (1969); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation,* 42 Duke L.J. 1141, 1165 (1993); Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III,* 91 Mich. L. Rev. 163, 174-77 (1992).

treated in the same manner as other plaintiffs for purposes of standing.[21]

In light of the conflict between *qui tam* litigation and this Court's standing jurisprudence, federal courts have struggled to explain how the two may co-exist. The result has been disagreement among those courts as to the constitutional basis for *qui tam* standing, and even flat rejection of principles previously established by this Court.[22] The Court should take this case to explain the place of *qui tam* litigation in the constitutional scheme and prevent further confusion and erosion of settled standing doctrine.

There are essentially three theories that have been adopted by courts and commentators in support of *qui tam* relator standing.

a. *Workplace Injury.* *Qui tam* relators are often present or former employees of government contractors who claim to have "blown the whistle" on the submission of false claims by their employers. In the present case, the plaintiff claims to have been wrongfully discharged by Boeing in retaliation for his whistleblowing. First Amended Compl. ¶¶ 7, 50-57. Some courts have held that relators suffer injury because they face a "Hobson's choice" between suffering retaliation for blowing the whistle or going along with dishonest conduct by their employer.[23] Other courts have speculated that relators suffer injury because of the embarrassment and shame of working for a dishonest employer.[24]

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[21] *Lujan*, 112 S. Ct. at 2143.

[22] For instance, the Second Circuit held that the requirement of particularized injury to the plaintiff is merely a prudential limitation on standing that Congress may override, even though this Court in *Lujan* had described particularized injury as part of the "irreducible constitutional minimum of standing." *Compare Kreindler*, 985 F.2d at 1153-54, *with Lujan*, 112 S. Ct. at 2136 & n.1.

[23] *Robinson*, 824 F. Supp. at 835; *Stillwell*, 714 F. Supp. at 1099.

[24] *Robinson*, 824 F. Supp. at 835. This argument was initially accepted by the court below, Pet. App. 42a-45a, and then deleted from its opinion.

The problem with this theory and its variants is that it does not justify standing for a cause of action based upon the submission of false claims to the Government. The false claims themselves cause injury only to the Government.

Retaliation against a whistleblower is a separate wrong, which is prohibited by another provision of the False Claims Act. 31 U.S.C. § 3730(h). This provision provides a private right of action for employees who believe they have been victims of retaliation. Such a claim was asserted in this case as a separate count from the *qui tam* claim, First Amended Compl. ¶¶ 50-52, and no one has suggested there is any constitutional defect in the retaliation claim.

b. *Legislated Standing.* Although this was not the basis for the decision below, some courts and commentators have held that Congress can legislate standing for a *qui tam* plaintiff by creating a statutory bounty.[25] This theory is superficially attractive because it seems plausible that the prospect of a bounty will provide a strong incentive for *qui tam* plaintiffs to pursue their cases vigorously, which is one of the policy objectives served by the standing doctrine.

However, this Court has made it clear in other contexts that a willingness to pursue litigation vigorously is not sufficient to establish standing. *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 225-26 (1974). Further, the prospect of a financial recovery in the form of attorneys fees is also not sufficient, since such an award is simply a "byproduct" of the lawsuit. *Diamond v. Charles,* 476 U.S. 54, 69-71 (1986).

The legislative bounty theory of standing should be distinguished from the situation where Congress adopts

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[25] Actually, some of the lower courts appeared to go even further, suggesting that Congress could confer standing whenever it wishes to do so, without regard to the case-or-controversy requirement of Article III. *See, e.g., Truong,* 728 F. Supp. at 620; *Newsham,* 722 F. Supp. at 614. Such holdings are obviously incorrect.

legislation that creates legal interests, the invasion of which can constitute injury in fact for purposes of conferring standing. See *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *Lujan*, 112 S. Ct. at 2146-47 (Kennedy, J., concurring).

Finally, to recognize a bounty as sufficient to confer standing would undermine this Court's established doctrines and provide a convenient loophole. By providing a bounty, perhaps even a nominal sum, Congress could confer standing on any or all citizens to pursue litigation on any issue, thus requiring the courts to resolve all sorts of political or ideological cases.[26]

c. *Derivative Standing.* Some courts and commentators, including the court of appeals below, have held that the *qui tam* plaintiff need not show personal standing because he is suing on behalf of the United States.[27] No one doubts that the United States has standing to sue for violations of the False Claims Act. Indeed, in a *qui tam* case where the United States takes over the prosecution, the standing and other separation of powers issues are largely mooted.

When the Government declines to take over the prosecution, however, there is no basis for permitting the relator to proceed without demonstrating his own standing. This situation is not analogous to one where the Government hires private counsel to represent it in litigation.[28] Here the relator is himself the party, not simply an attorney for the Government.

Moreover, in this case there is no evidence that the Justice Department intended to effectuate an assignment

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[26] *See* Sunstein, *supra* note 20 at 232 (advocating use of cash bounties to create standing in response to *Lujan*).

[27] *See* Pet. App. 8a; *Kriendler*, 985 F.2d at 1153-54; *Givler*, 775 F. Supp. at 180-81; *Truong*, 728 F. Supp. at 618-20; *Stillwell*, 714 F. Supp. at 1098.

[28] *See, e.g.*, Fair Debt Collection Practices Act, 31 U.S.C. § 3718 (authorizing Attorney General to retain private counsel, subject to government control, in debt collection cases).

of the Government's claim to the relator. Under the statute, the Government is not required to state a reason for declining to take over a *qui tam* case. It seems most likely, however, that the Justice Department simply concluded that the case was without merit.[29]

Nor is there any evidence that Congress intended the False Claims Act to effectuate a contingent partial assignment of the Government's claim to whomever might file suit as a relator. As with the "bounty" theory of standing, permitting such an assignment would also provide a loophole allowing Congress to create standing without regard to the limitations imposed by Article III.

In any event, the theory of derivative standing makes it clear that the *qui tam* relator is performing a delegated governmental function and not a private one. Even if this could be sufficient to confer standing, it would only exacerbate the infirmity of the *qui tam* plaintiff under the Appointments Clause.

2. *Appointments Clause*

This case presents the issue of whether a person can exercise civil law enforcement authority without satisfying the Appointments Clause of Article II. The clause provides that officers of the United States must be appointed by the President with the advice and consent of the Senate. Inferior officers may also be appointed by the President alone, by the heads of departments, or by the courts of law. U.S. Const. art. II, § 2, cl. 2.

Persons exercising "significant authority pursuant to the laws of the United States" are "officers" and must be appointed in one of the ways prescribed in the Appointments Clause. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). As this Court recently stated, the Appointments Clause serves an important function of assuring governmental accountability.

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[29] *See Hearing before the Subcommittee on Civil and Constitutional Rights, Judiciary Committee, U.S. House of Representatives*, 102d Cong., 2d Sess. 19-20 (Apr. 1, 1992) (statement of Assistant Attorney General Stuart M. Gerson).

> The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government. . . . The Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power.

Freytag v. Commissioner, 111 S. Ct. 2631, 2642 (1991).[30] Use of the Appointments Clause is not confined to a few high-ranking positions but extends, for example, to every officer in the Armed Forces and every Assistant United States Attorney. *See* 10 U.S.C. § 531 (appointment of officers in armed services); 28 U.S.C. § 542 (Assistant U.S. Attorneys).

It is conceded that *qui tam* relators are not appointed in the manner provided in the Appointments Clause. Yet Congress has delegated to them the power to pursue litigation on behalf of the United States. The Court in *Buckley* specifically held that such power may only be exercised by an officer of the United States.

> We hold that these provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Art. II, § 2, cl. 2, of the Constitution. Such functions may be discharged only by persons who are "Officers of the United States" within the language of that section.

424 U.S. at 140. More recently, this Court relied on *Buckley* in finding it "clear" that an independent counsel under the Ethics in Government Act is an officer of the United States. *Morrison v. Olson,* 487 U.S. 654, 671 n.12 (1988).

The court below stated that where, as here, the Government does not intervene to take over a *qui tam* prosecution, "a relator retains primary responsibility for the litigation, thus presenting what may seem to be a close

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[30] *See also id.* at 2653 (Scalia, J., concurring in part and concurring in the judgment) (Appointments Clause assures accountability by reinforcing Executive authority).

question under *Buckley*. . . ." Pet. App. 30a. However, the court found no constitutional violation because the relator's power extends to a single case and can be limited by the court. *Id.* Of course, these factors may distinguish *Buckley* but they cannot be reconciled with *Morrison*, since an independent counsel also has power limited to a single matter and is subject to the control of the courts. *See Morrison*, 487 U.S. at 672 (these factors justify treating independent counsel as "inferior" officer).

The court below and other lower courts have also suggested a variety of other factors that would make the Appointments Clause inapplicable to *qui tam* relators, relying on cases that hold the clause inapplicable to certain kinds of employees and agents.[31] Among the factors cited are absence of a fixed term of office, part-time status, and lack of a salary. These factors cannot be dispositive, since most would also apply to the independent counsel held to be an officer in *Morrison*. Indeed, in the early days of the Republic, many officers (including the Attorney General) worked only part-time for the Government.[32] Some of these officers were compensated, at least in part, by the receipt of bounties.[33]

It should be noted that this Appointments Clause issue is presented because *qui tam* relators are suing on behalf of the Government and not to vindicate their own interests. The same concerns are not raised where Congress creates private rights of action for citizens who have been injured by conduct in violation of a statute, or even where

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[31] *See Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (holding that an appraiser hired to assist a government official is an "executive agent" not subject to the Appointments Clause); *United States v. Germaine*, 99 U.S. 508 (1878).

[32] *See* Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* 66 n.1 (1953) ("For the first half century or more, the Attorney General was only a part-time legal advisor, with no professional and little or no clerical help.").

[33] *See* Gerson Statement, *supra* note 29, at 9 (noting early historical practice of compensating United States prosecutors from fees obtained in cases).

a victim is given the right of criminal prosecution. As this Court observed in *Buckley*, it is the power to bring suit to vindicate "public rights" that requires compliance with the Appointments Clause. 424 U.S. at 140.

3. *Separation of Powers*

This case also presents the issue of whether the President's authority to control litigation can be shifted to a private litigant consistent with the provisions of Article II that vest in the President "the Executive Power" and the responsibility to "take care" that the laws are faithfully executed.

Congress has been permitted to place some limits on Presidential authority where there is a good reason for doing so and where the President's essential role in the constitutional scheme is adequately preserved. *Morrison v. Olson*, 487 U.S. 654 (1988); *United States v. Nixon*, 418 U.S. 683 (1974); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

Applying the Court's separation of powers balancing test to the *qui tam* statute shows that it is unconstitutional. This is because Congress can demonstrate no good reason for diminishing Presidential authority.

In the *Morrison* and *Nixon* cases, the Court found that the inherent conflict of interest in situations of alleged wrongdoing by the President or high-level executive appointees justified the intrusion on presidential authority and independence. *Morrison*, 487 U.S. at 677, 695-96; *Nixon*, 418 U.S. at 706-07. Here, however, there is no conflict of interest.

In *Humphrey's Executor*, the Court indicated that a certain degree of independence from the President was justified for an agency with quasi-judicial and quasi-legislative powers. 295 U.S. at 629. Here, however, the *qui tam* relator has no such powers; the prosecution of civil cases is purely an executive function.[34]

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[34] *Buckley*, 424 U.S. at 138; *Nixon*, 418 U.S. at 693 ("[T]he Executive Branch has exclusive authority and absolute discretion to

The only reasons that have been offered for the *qui tam* provisions of the False Claims Act are that Congress does not fully approve of the way the Executive Branch has exercised its authority to prosecute cases under the False Claims Act, and that it would like to allow private plaintiffs to pursue these cases as well.[35] This, however, is an impermissible motive. Congress cannot transfer law enforcement authority from the Executive simply because it does not like the way that authority is being exercised and would prefer to have some other private or public entity exercise it instead.[36]

Because there is no valid reason for diminishing the President's constitutional authority, it is not necessary to determine exactly how serious a diminution is effected by the Act. This is one of those cases where a balancing test is easy to apply because there is literally nothing on one side of the balance.

However, it should be noted that the extent of the impairment here is quite serious, in many ways more intrusive than the impairment considered by the Court in *Morrison v. Olson*. In the first place, the Ethics in Government Act gives the Attorney General the absolute and

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decide whether to prosecute a case. . . ."); *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) (enforcing law is executive function).

[35] *See* 131 Cong. Rec. 22,322 (1985) (remarks of Sen. Grassley) (accusing "Government bureaucracy" of being "unwilling to guard against or aggressively punish fraud"); 132 Cong. Rec. 22,339 (1986) (remarks of Rep. Berman) (stating that "the Department of Justice has not done an acceptable job of prosecuting defense contractor fraud").

[36] The argument that the Executive lacks sufficient resources to prosecute false claims cases also does not provide a valid reason for this law. Perhaps such a justification may have had some validity during the national crisis posed by the Civil War, but today Congress could certainly increase the resources of the Justice Department if more attorneys are needed for such cases. If inadequacy of resources were recognized as a valid justification, Congress could always create an insufficiency of resources when it wished to use this excuse for transferring enforcement authority from the Executive.

unreviewable discretion to decide whether to apply for the appointment of an independent counsel.[37] Once selected, the independent counsel is required to follow the policies of the Justice Department.[38] At any time, the independent counsel is subject to removal for cause.[39] This Court found all of these features of the statute relevant to its decision to sustain the constitutionality of the Act. 487 U.S. at 691-93.

In contrast, the Executive Branch has no ability to control the decision of *qui tam* plaintiffs to bring suit, and they are not required to adhere to the policies of the Justice Department. Indeed, relators are free to advocate positions of fact or law that are contrary to the position of the Department.[40] If the Department decides to take over the prosecution of a case, it can partially displace the relator and assume the principal responsibility for prosecuting the case. However, the relator cannot be entirely removed from the case, even for good cause, and the Department has no power to control or remove the relator if it declines to intervene in a case.[41]

It is worth recognizing that these concerns are not merely theoretical but practical. Litigation by relators can establish interpretations of the False Claims Act and other statutes that are binding precedent on the Government. Such litigation can also disrupt the relationship of the Government with its suppliers, including the administration of vital national security programs such as the B-2 Bomber and Advanced Tactical Fighter programs involved in the present case.[42]

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[37] 28 U.S.C. § 592(f). *See Morrison*, 487 U.S. at 695.

[38] 28 U.S.C. § 594(f). *See Morrison*, 487 U.S. at 696.

[39] 28 U.S.C. § 596(a)(1). *See Morrison*, 487 U.S. at 691-92.

[40] *See generally* 13 Opp. Off. Legal Counsel 249.

[41] 31 U.S.C. §§ 3730(c)(2)(C), (c)(3).

[42] There is also the possibility that decisions in *qui tam* lawsuits will be binding upon the Government through the operation of *res judicata*, collateral estoppel, or the Double Jeopardy Clause. *See* Park, *supra* note 3.

4. *Due Process*

The due process issue in this case is whether litigation to impose civil penalties can be brought by a financially-interested prosecutor. We start with the basic proposition that a judge may not have a financial interest in the outcome of a civil or criminal case. The leading case on this point, *Tumey v. Ohio,* 273 U.S. 510 (1927), involved a mayor who acted as a judge for traffic offenses and received a statutory bounty—the court costs paid by convicted defendants—as part of his compensation. This Court has had no problem in finding that such arrangements deny the accused due process of law, even where the financial interest of the decisionmaker is fairly attenuated.[43]

This Court has never had to consider the question, but it has been generally held that contingent-fee arrangements for criminal prosecutors are also improper.[44] Although our system of justice is adversarial in nature, it has been long accepted that government prosecutors have a higher duty than lawyers for ordinary litigants.

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and

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[43] *See, e.g., Ward v. Monroeville,* 409 U.S. 57 (1972) (violation of Due Process Clause where revenues from traffic cases went to city budget and did not personally benefit the mayor).

[44] *See* Annot., *Validity of contract by attorney to prosecute or assist in prosecution of criminal case on contingent fee,* 11 A.L.R. 1192 (1921). Apart from contingent fees, other sorts of personal interests in the outcome of cases have been held to disqualify criminal prosecutors. *See, e.g., United States v. Heldt,* 668 F.2d 1238, 1277 (D.C. Cir. 1981) (prosecutor's status as defendant in civil action could give rise to disqualifying conflict), *cert. denied,* 465 U.S. 926 (1982); *Ganger v. Peyton,* 379 F.2d 709, 714 (4th Cir. 1967) (disqualification of prosecutor for representation of defendant's wife in divorce proceeding); *Colorado v. Jimenez,* 528 P.2d 913, 915-16 (Colo. 1974) (concurrent prosecution of defendant and representation of victim's family constituted grounds for disqualification).

> whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). Similarly, in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), this Court exercised its supervisory power to overturn criminal contempt convictions where counsel for a private litigant had been appointed to prosecute opposing parties for violating a court order.[45]

The same considerations also apply to civil enforcement actions brought on behalf of the Government, including *qui tam* suits under the False Claims Act.[46] The Act authorizes the recovery of treble damages, plus a forfeiture of five to ten thousand dollars for each claim submitted. It is often alleged that each invoice, time card or other supporting document is a separate "claim" for purposes of calculating the amount of the forfeiture.[47] This court has recognized that civil penalties imposed under the False Claims Act can be so severe in some cases as to constitute "punishment" for purposes of the Double Jeopardy Clause. *United States v. Halper*, 490

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[45] Justice Blackmun concurred on the ground that the Due Process Clause requires "a disinterested prosecutor with the unique responsibility to serve the public . . . ." 481 U.S. at 815.

[46] *See People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740, 705 P.2d 347, 218 Cal. Rptr. 24 (1985) (disqualifying contingent-fee lawyer from representing a city government in civil action to abate a nuisance), *cert. denied*, 475 U.S. 1121 (1986). *See also Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47-48 (D.C. Cir. 1992) (obligation of Government lawyer, even in civil case, is to see "that justice shall be done," not simply "to pound an opponent into submission").

[47] *See, e.g., United States v. Bornstein*, 423 U.S. 303, 311-13 (1976) (allegation that each invoice submitted to the Government constitutes a separate claim for purposes of False Claims Act lawsuit).

U.S. 435 (1989).[48] For purposes of the Due Process Clause, bounty-seeking *qui tam* plaintiffs are just as offensive as a bounty-seeking prosecutor.

This Court considered the problem of civil enforcement by a financially-interested government prosecutor in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). The Court rejected the argument that the receipt of fines by an agency caused its administrative prosecutors to have the sort of financial interest that would violate the Due Process Clause. However, the Court strongly indicated that a direct and substantial financial interest by civil prosecutors would constitute such a violation.

> We do not suggest, and appellants do not contend, that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors. . . . [T]he decision to enforce—or not to enforce—may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions . . . .

Id. at 249-50.

The lower court misconceived the due process issue in this case by finding that the relator's interest in a financial recovery was fully congruent with the public interest in successfully enforcing the False Claims Act. Pet. App. 33a. The same could be said for the municipality's interest in successfully enforcing its traffic laws in *Tumey v. Ohio* or the public interest in obtaining successful prosecutions by employing contingent-fee criminal prosecutors.

The point is that prosecutors, including those empowered to seek the imposition of civil penalties, should make

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[48] The Court reserved the question of whether the same considerations would apply in a qui tam suit. 490 U.S. at 451 n.11.

their decisions based upon the public interest without the influence of personal financial gain.

II. THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT INVOLVE ISSUES OF WIDESPREAD IMPORTANCE MERITING IMMEDIATE REVIEW.

The constitutional issues raised by the *qui tam* provisions of the False Claims Act require immediate resolution by this Court. Such review will prevent *qui tam* actions from miring the courts, parties, and the Department of Justice in an ever-increasing number of expensive and complex lawsuits. It also may permit Congress to adopt in a timely manner legitimate alternatives to *qui tam* for combatting fraud against the Government. And it will provide the lower courts with definitive guidance on important constitutional questions whose treatment to date has been marked by confusing and often conflicting decisionmaking.

A. Review of the *Qui Tam* Provisions is Necessary to Avoid Further Wasteful Litigation.

The lower courts unquestionably have witnessed explosive growth in the number of *qui tam* actions brought under the statute. Only 20 *qui tam* lawsuits had been brought during the ten-year period leading to the 1986 amendments. In the seven years since those amendments, however, approximately 600 cases have been filed.[49] The number of *qui tam* filings almost doubled in 1987 alone, and the suits have increased at sometimes geometric rates in every subsequent year.[50] Indeed, nearly 120 new *qui*

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[49] Letter from Frank W. Hunger, Assistant Attorney General, Civil Division, Department of Justice, to the Honorable Howell Heflin, Chairman, Subcommittee on Courts and Administrative Practice, Committee on the Judiciary, U.S. Senate 3 (Sept. 2, 1993). *See Hearings on S. 841—The False Claims Act Amendments of 1993, before the Subcommittee on Courts and Administrative Practice, Committee on the Judiciary, U.S. Senate* 1-3 (Sept. 9, 1993).

[50] *See Report on False Claims Act Implementation, Subcommittee on Administrative Law and Government Relations, House Judiciary Committee*, 101st Cong., 1st Sess. 1-A, 6-A (Apr. 4, 1990) (citing

tam actions were filed in 1992.[51]

In the vast majority of the 600 cases that have been filed—including the instant lawsuit—the Department of Justice has refused to intervene, leaving the relator to pursue the litigation alone. The Justice Department's decision not to intervene usually follows an expensive and time-consuming investigation of the relator's claims.[52] The Assistant Attorney General formerly responsible for the investigation and prosecution of *qui tam* lawsuits has complained that many of those cases are "frivolous" and "meritless." [53] Moreover, the cases that have been prosecuted by *qui tam* relators often result in little monetary recovery by the Government, since many relators structure the settlements to avoid sharing what can amount to millions of dollars by characterizing the payments as "attorney's fees," "wrongful termination settlements," or damages for "emotional distress." [54]

Notwithstanding, or perhaps even because of these difficulties, the volume of *qui tam* litigation is likely to expand dramatically. One obvious spur to such an expansion is the enormous amount of money at stake. Several *qui tam* cases have been reported to involve claims for hundreds of millions of dollars,[55] and total claims from

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statistics for Fiscal Years 1987 through 1989); *Report Confirms Success of Whitsleblowers*, The DOJ Alert, Oct. 1992, at 15 (showing statistics for period through 1992).

[51] *Report Confirms Success of Whistleblowers*, The DOJ Alert, October 1992, at 15-16.

[52] Gerson Statement, *supra* note 29, at 19-20.

[53] *Id.* at 19.

[54] *Id.* at 22-23. *See also DOJ Objects to Whistleblower Settlements*, The DOJ Alert, July 1992, at 7-8 (describing cases in which relator manipulated settlement terms to increase share of award at the expense of the Government).

[55] *See Qui Tam Law Has Aided Antifraud Efforts, but Has Drawbacks, Justice Tells Congress*, 53 Fed. Cont. Rep. (BNA) 488 (Apr. 9, 1990) (noting pendency of "$100 million *qui tam* cases"); *see also United States ex rel. Taxpayers Against Fraud v. Singer*

all pending lawsuits may well exceed one billion dollars.[56] Not surprisingly, members of the plaintiff's bar view *qui tam* as having created "unprecedented opportunities for private attorneys" to be "paid handsomely for the job" of acting as "a quasi-public prosecutor of fraud." [57]

The nature of the False Claims Act itself makes an increase in litigation highly probable. By its terms, it is a statute of almost universal application, implicated by almost any Government contract, grant, appropriation, and spending program.

There are many examples of the reach of *qui tam* beyond defense procurement. Since the passage of the 1986 amendments, the Act has been applied to challenge alleged misrepresentations by nuclear power plants to public utility commissions, alleged bid rigging of moving contracts with the Government, alleged violations of the Buy American Act, alleged violations of the Anti-Kickback Act, alleged failures to test products sold to the Government, alleged fraudulent practices under the Foreign Military Sales Act, and even alleged violations of the Davis-Bacon Act.[58] Some commentators predict that *qui tam*

Co., 889 F.2d 1327, 1329 and nn. 7 & 9 (4th Cir. 1989) (claim for alleged $77 million overcharge).

[56] John R. Phillips, *Qui Tam Litigation: A New Forum for Prosecuting False Claims Against the Government*, 14 J. Legal Med. 267 (1993).

[57] *Id.* at 267.

[58] *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407 (E.D.N.Y. 1989) (nuclear power plants); *United States v. Bonanno Org. Crime Family*, 695 F. Supp. 1426 (E.D.N.Y. 1988) (moving contracts); *United States v. Rule Indus.*, 878 F.2d 535 (1st Cir. 1989) (Buy American Act). *See generally* James B. Helmer & Robert C. Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, The 1986 Amendments to the False Claims Act, and Their Application in the United States ex rel. Gravitt v. General Electric Co. Litigation*, 18 Ohio N. L. Rev. 35, 73-74 (1991). The types of defendants targeted in *qui tam* actions also have expanded outside the defense industry, to include even institutions such as Stanford University and the University

suits will be employed to challenge violations of environmental and labor laws, as well as in the areas of scientific testing and employment discrimination.[59]

Nowhere is the impact of future *qui tam* litigation likely to be greater than in the field of health care. Although several actions already have been brought to challenge alleged violations of federal law in the processing of claims for Medicare payments,[60] the plaintiff's bar views federal health care expenditures as an as yet untapped source of future *qui tam* lawsuits.[61] Congress also has promoted the greater use of *qui tam* lawsuits in this area, declaring in recent legislation that it was the "sense of the Senate" that the False Claims Act and its *qui tam* provisions "be used to their full effect in combatting health care fraud against the Government."[62] The substantial additional governmental involvement in the health care industry that is contemplated by the current Administration's health care reform legislation also could provide fertile ground for new suits, insofar as those proposals would

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of Texas. *See United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Center*, 961 F.2d 26 (4th Cir. 1992).

[59] *See* Major John C. Kunich, USAF, *Qui Tam: White Knight or Trojan Horse*, 33 A.F. L. Rev. 31, 47 (1990) (noting possible use of qui tam in challenges to government contractor's noncompliance with environmental laws); Ron Simon, "Fraud in Government Contracting," in *The Lawyer's Brief* 13 (Dec. 31, 1990) (noting possible expansion of qui tam into areas of labor law, scientific testing, and employment discrimination).

[60] *United States ex rel. Stinson v. Prudential Ins. Co. of Am.*, 736 F. Supp. 614 (D.N.J. 1990), *aff'd*, 944 F.2d 1149 (3d Cir. 1991); *United States ex rel. Stinson v. Provident Life & Accident Ins. Co.*, 721 F. Supp. 1247 (S.D. Fla. 1989). One commentator has predicated that future *qui tam* suits will move from challenges based on claim-handling procedures to ones premised on the poor quality of medical services provided under federal programs. David C. Hsia, *Application of Qui Tam to the Quality of Health Care*, 14 J. Legal Med. 301, 317 (1993).

[61] Phillips, *supra* note 56, at 272-73.

[62] S. 2652, 103d Cong., 1st Sess. § 8 (Oct. 3, 1992) ("Health Care Fraud Prosecution Act of 1992").

vastly increase the number of transactions subject to potential False Claims Act liability.[63]

Pending amendments to the False Claims Act also would broaden the availability of *qui tam* actions, both by clarifying the ability of federal employees to act as relators and by codifying the retroactive effect of the 1986 amendments.[64] Congress also has considered expanding *qui tam* to other areas. One Senator recently observed:

> *Qui tam* is not limited to fraud in public contracting. It can be used in whatever circumstances Congress deems appropriate. . . . The only boundary to its use is congressional imagination.[65]

These facts all point to the need for review of the constitutionality of *qui tam*. If, as petitioner contends, this device is unconstitutional, the failure to decide that issue now will result in the unnecessary expenditure of time and money by the lower courts, Congress, and defendants.

B. Review Is Necessary to Permit Congress to Adopt a Timely Remedy for the Unconstitutionality of the *Qui Tam* Device.

Prompt review of this question would have the added benefit of permitting Congress to consider alternative measures for fighting fraud against the Government. Unless and until such review occurs, Congress will persist in its use of *qui tam* to the exclusion of other, legitimate means of achieving its legislative objectives.

Alternative methods do exist. At a minimum, more funds could be appropriated for Justice Department attorneys to pursue civil fraud cases. At the same time, a monetary reward system could be established as an in-

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[63] *See* Peter H. Stone, *A Golden Whistle Beckons Law Firms*, Nat'l J., Sept. 25, 1993, at 2319.

[64] H.R. 2915, 103d Cong., 1st Sess. (1993); S. 841, 103d Cong., 1st Sess. (1993).

[65] 139 Cong. Rec. S875 (daily ed. Jan. 28, 1993) (remarks of Sen. Grassley).

centive for individuals to come forward with information that could serve as the basis for cases to be prosecuted by the Government.[66] This system would accomplish the same goals as the *qui tam* provisions of the False Claims Act without suffering from constitutional infirmity.

It is highly unlikely that Congress will pursue these alternatives in the absence of a finding by this Court that the *qui tam* provisions of the False Claims Act are unconstitutional. Even the former Attorney General's expressed concern for the constitutional infirmities of *qui tam* has failed to dampen the ardor of Congressional enthusiasts for continued and expanded use of such suits.[67] This unquestioning reliance on *qui tam* forecloses the consideration of equally effective and more appropriate measures for combatting fraud.

III. THE COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DETERMINE THE CONSTITUTIONALITY OF THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT.

This lawsuit presents the paradigm of the constitutionally-suspect *qui tam* action. The Government has played no part in the prosecution of this matter, having refused to intervene after completing a 40-month investigation of the relator's charges. Only the private plaintiff is pursuing this litigation. Consequently, the posture of this case presents the constitutional issues in their sharpest focus.

That the case was decided by the court below on an interlocutory appeal does not blur the picture. This Court has on any number of occasions granted certiorari

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[66] This type of reward system ultimately was adopted as an alternative to *qui tam* in the 1990 legislation aimed at combatting fraud in the savings and loan industry. 136 Cong. Rec. S9486 (daily ed. July 11, 1990) (remarks of Sen. Roth) (discussing bounty system proposed in Simon-Roth-Dixon amendment).

[67] *See* 139 Cong. Rec. S875-76 (daily ed. Jan. 28, 1993) (remarks of Sen. Grassley) (dismissing concerns raised by former Attorney General Barr and describing constitutional challenges to qui tam as "preposterous").

notwithstanding the lack of finality of the judgment for review was sought. *See, e.g., Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Larson v. Domestic & Foreign Comerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).

The constitutional issues raised by this petition involve critical questions regarding the plaintiff's capacity to sue, the jurisdiction of the courts to entertain the suit, and the defendant's burden of having to defend the suit. All of these issues are entirely independent of the merits of the plaintiff's allegations. Their resolution is fundamental not only to the further progress of this litigation, but to the hundreds of *qui tam* suits pending or likely to be filed in the near future. Under these circumstances, there is no reason for the Court to insist upon a full trial record before undertaking to resolve those issues.

There is also no reason to postpone review to permit further "percolation" of the issues concerning the constitutionality of *qui tam*. The arguments have been developed and refined through extensive litigation and commentary.[68] Thus, it is unlikely that additional consideration of these issues by the lower courts will produce enough new insight—if indeed it produces any—to outweigh the harm that would result from delaying resolution.

Finally, it may be some years before a fully-litigated case can reach this Court. The vast majority of *qui tam* suits in which the Government elects not to intervene typically never get to trial, thus mooting the constitutional issues.[69] One reason, if not the primary reason, for this result is the immense pressure imposed upon a defendant to settle even an unmeritorious *qui tam* suit, although such settlements often occur only after the expenditure of substantial efforts by the judiciary, the parties, and the

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[68] *See* cases cited, *supra* note 4, and articles cited, *supra* note 3.

[69] *See* Gerson Statement, *supra* note 29, at 22-23.

Justice Department. The present case thus provides the Court with what has been, and will continue to be, a rare opportunity to provide a definitive ruling on these issues. If this Court does not avail itself of this opportunity, the district courts and litigants will continue to expend valuable resources engaged in a debate that should be resolved now.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-36660

D.C. No. CV-89-1732-R

UNITED STATES OF AMERICA, *ex rel.*
KEVIN G. KELLY,
Plaintiff-Appellant,

v.

THE BOEING COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding

Argued and Submitted April 7, 1993
Pasadena, California

Filed September 7, 1993
Amended: November 5, 1993

AMENDED OPINION

Before: HALL, WIGGINS and LEAVY, Circuit Judges

Opinion by Judge Hall

HALL, Circuit Judge:

This appeal presents several constitutional challenges to the qui tam provisions of the False Claims Act, 31 U.S.C. §§ 3729 et seq. The question of the constitutionality of the qui tam provisions is one of first impres-

sion in this circuit. We hold that these provisions do not exceed the limitations of Article III of the Constitution, nor do they violate the constitutional principle of separation of powers, the Appointments Clause of Article II, or the Due Process Clause of the Fifth Amendment.

I. OVERVIEW AND BACKGROUND

The Boeing Company ("Boeing") appeals the district court's denial of its motion to dismiss a qui tam action under the False Claims Act ("FCA" or "the Act"). Qui tam plaintiff Kevin G. Kelly filed the action against Boeing on behalf of the United States to recover damages and penalties for allegedly fraudulent charges to the United States. Boeing claimed in its motion to dismiss that the district court lacked jurisdiction over Kelly's suit because the provisions of the FCA which authorize qui tam actions are unconstitutional.

The district court rejected Boeing's four constitutional challenges to the FCA, but certified an interlocutory appeal of its rulings on the constitutional issues. We granted permission to appeal pursuant to 28 U.S.C. § 1292(b). We have considered and likewise rejected Boeing's arguments. Therefore, we affirm.

A. *Facts and Proceedings Below.*

In November 1989, Kelly, a former Boeing employee, filed a complaint under seal alleging that Boeing committed various violations of the False Claims Act related to its work as a subcontractor on the government's B-2 Bomber and Advanced Tactical Fighter programs. Kelly claimed that Boeing improperly charged to the government certain facilities lease costs. Kelly served his complaint on the government, as required under the Act, after which the government investigated his allegations for over three years. Upon completing its investigation, the government elected not to intervene in the case. The district court then unsealed the case, and Kelly served

on Boeing an amended complaint. Boeing then moved to dismiss, raising the four constitutional challenges that it pursues in this appeal. The district court denied Boeing's motion,[1] and certified the constitutional issues for immediate appeal to this court.

B. *The Qui Tam Provisions of the FCA.*

The FCA, which Congress originally enacted in 1863, is the government's "primary litigative tool for combatting fraud" against the federal government. Senate Judiciary Committee, False Claims Amendments Act of 1986, S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266. The Act authorizes both the Attorney General and private persons to bring civil actions to enforce the Act. 31 U.S.C. § 3730 (1988). Congress amended the FCA in 1986 to increase the financial and other incentives for private individuals to bring suits under the Act and thereby to enlist the aid of the citizenry in combatting the rising problem of "sophisticated and widespread fraud."[2] S. Rep. No. 345 at 2, 23-24, *reprinted in* 1986 U.S.C.C.A.N. at 5267, 5288-89.

Section 3730(b) of the FCA as now constituted provides that a person may bring a civil action for a violation of the substantive provisions of the Act "for the person and for the United States Government. The action shall be brought in the name of the Government." 31

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[1] The district court granted Boeing's motion to dismiss a state law wrongful discharge claim included in Kelly's amended complaint. Kelly does not contest that ruling.

[2] The legislative history indicates that Congress sought to encourage more private enforcement of the FCA because "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity. Yet in the area of Government fraud, there appears to be a great unwillingness to expose illegalities." S. Rep. No. 345 at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269.

U.S.C. § 3730(b)(1). An action under this provision is termed a "qui tam" [3] suit, and the person who brings such an action is referred to as a "relator" or "informer". If the government files an action to enforce the FCA, a would-be relator may not later bring any action based on the same underlying facts. 31 U.S.C. § 3730(e)(3). Nor may a private party litigate a qui tam suit based on the public findings of a government investigation or on disclosures in the news media, unless that party is an original and independent source of the information on which the complaint is based. *Id.* § 3730(e)(4)(A)-(B).

Upon bringing a qui tam action, a relator must serve on the government a copy of the complaint and written disclosure of substantially all material evidence and information the relator possesses. The complaint must be filed in camera and remain under seal for at least 60 days so that the government may investigate the relator's allegations, though upon a showing of "good cause" the government may move the court for extensions of the 60 day period. *Id.* § 3730(b)(2), (3). By the end of the period provided for the government's investigation, the government must decide whether to intervene and proceed with the action, "in which case the action shall be conducted by the Government," *id.* § 3730(b)(4)(A), or whether to decline to take over the action, "in which case the person bringing the action shall have the right to conduct the action." *Id.* § 3730(b)(4)(B).

The Act explicitly provides that if the government takes over the qui tam action from the start, "it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing

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[3] The term "qui tam" is short for "qui tam pro domino rege quam pro se imposo sequitur," which is interpreted as "who brings the action as well for the king as for himself." *Bass Anglers Sportsman's Soc'y of America v. U.S. Plywood-Champion Papers, Inc.*, 324 F. Supp. 302, 305 (S.D. Tex. 1971).

the action." *Id.* § 3730(c)(1). Though the relator "shall have the right to continue as a party," *id.*, the government may end the litigation or limit the participation of the relator in several ways. First, the government may dismiss the action "notwithstanding the objections of the person initiating the action" once the relator has received notice and an opportunity for a hearing on the dismissal motion. *Id.* § 3730(c)(2)(A). Second, the government may settle with the defendant "notwithstanding the objections of the person initiating the action," but only if the court determines after a hearing "that the proposed settlement is fair, adequate, and reasonable under all the circumstances." *Id.* § 3730(c)(2)(B). Third, the government may request that the court impose appropriate limitations on the relator's participation if it shows that unrestricted participation "would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment." *Id.* § 3730(c)(2)(C). The Act also provides the defendant an opportunity to request that the court limit the relator's participation, upon a showing that unrestricted participation "would be for purposes of harassment or would case the defendant undue burden or unnecessary expense." *Id.* § 3730(c)(2)(D).

When the government chooses not to take over a qui tam action, the relator "shall have the right to conduct the action." *Id.* § 3730(c)(3). Upon the government's request, however, the relator must serve the government with copies of all pleadings and deposition transcripts. Whether or not the government takes over the action from the outset, it may ask the court to stay the relator's discovery for an extendable 60-day period, upon a showing that the relator's discovery "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts." *Id.* § 3730(c)(4).

In cases where the government initially elects not to take over the action, the court "may nevertheless permit

the Government to intervene at a later date upon a showing of good cause." *Id.* § 3730(c)(3). In permitting late intervention, the court may not limit "the status and rights" of the relator. *Id.* The parties and amici in this appeal raise two questions concerning this particular aspect of the qui tam provisions. First, they dispute the height of the "good cause" hurdle. Second, they dispute the meaning of the proviso that the court may not limit the relator's "status and rights." Boeing claims that this proviso means the relator retains primary authority to conduct the action, whereas Kelly claims that this simply means the relator retains the right to participate as a party to the litigation.[4] Both questions relate to the broader issue, addressed in the discussion section of this opinion, concerning the extent of the government's ability to exert control over a qui tam suit.

The Act provides for a range of possible awards to successful qui tam plaintiffs. In actions which the government has taken over, the relator receives between 15 and 25 percent of the proceeds of the action or settlement of the claim. But if the court finds that the action is based primarily on information of which the relator is not the original source, the relator's award must be limited to no more than 10 percent of the proceeds or settlement. In actions in which the government has not intervened, the relator receives between 25 and 30 percent of the proceeds or settlement. In any of the above situations, the relator also receives an amount for reasonable expenses, attorneys' fees and costs, awarded against the defendant rather than taken out of the proceeds or settlement. *Id.* § 3730(d)(1), (2). On the other hand, an unsuccessful relator in a case in which the government has not intervened may be ordered to pay the defendant its reasonable attorneys' fees and expenses if the court

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[4] Kelly argues that § 3730(c)(3) "simply secures the party status and percentage award to which the relator would have been entitled had he continued to litigate the case without government intervention."

finds that the relator's claim "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." *Id.* § 3730(d)(4).

II. STANDARD OF REVIEW

We review de novo the purely legal question whether a statute is constitutional. *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir. 1993). We are mindful that we should invalidate an act of Congress only "for the most compelling constitutional reasons." *Mistretta v. United States,* 488 U.S. 361, 384 (1989) (quoting *Bowsher v. Synar,* 478 U.S. 714, 736 (1986) (Stevens, concurring in judgment)). Furthermore, we recognize that we are obliged whenever "fairly possible" to interpret a statute in a manner that renders it constitutionally valid. *Communications Workers of America v. Beck,* 487 U.S. 735, 762 (1988). Our adherence to this principle of presumptive constitutionality is guided by our understanding that "[w]hen we are required to pass on the constitutionality of an Act of Congress, we assume 'the gravest and most delicate duty that this Court is called on to perform.'" *Fullilove v. Klutznick,* 448 U.S. 448, 472 (1980) (citation omitted).

III. DISCUSSION

A. *Standing.*

1. Article III Requirements.

We first address the threshold question of justiciability —whether a qui tam plaintiff has standing to sue under the FCA. Article III, section 2 of the Constitution limits the judicial power of the United States to the resolution of cases and controversies. The doctrine of standing is used to determine whether a conflict qualifies as a case or controversy and is therefore capable of judicial resolution. *Lujan v. Defenders of Wildlife,* 112 S.Ct. 2130, 2136 (1992). Standing, in turn, is dependent on three conditions. First, the plaintiff must have suffered an "injury

in fact." This consists of an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent. Second, there must be a causal connection between the injury and the conduct serving as the basis of the lawsuit. In other words, the injury has to be traceable to the challenged action of the defendant and not the result of the conduct of a third party not before the court. Third, it must be likely that the injury will be redressed by a favorable decision. *Id.*

Boeing and amici curiae argue that the only injuries implicated in qui tam suits are injuries to the federal treasury resulting from false claims against the United States. Qui tam relators do not suffer harm, and are therefore unable to establish the constitutional elements of standing. It follows that by granting standing to private parties, the FCA's qui tam provisions run afoul of Article III and are unconstitutional.

We disagree and hold that the FCA effectively assigns the government's claims to qui tam plaintiffs such as Kelly, who then may sue based upon an injury to the federal treasury. Under this theory of standing, the FCA's qui tam provisions operate as an enforceable unilateral contract. The terms and conditions of the contract are accepted by the relator upon filing suit. If the government declines to prosecute the alleged wrongdoer, the qui tam plaintiff effectively stands in the shoes of the government. Because the government clearly is capable of establishing injury-in-fact, causation, and redressability, qui tam plaintiffs satisfy these Article III requirements as well.

Several courts and commentators have embraced this assignment theory. *See United States ex rel. Kreindler & Kreindler v. United Technologies Corporation,* 985 F.2d 1148 (2d Cir.), *cert. denied,* 113 S. Ct. 2962 (1993); *United States Dept. of Housing and Urban Develop. ex rel. Givler v. Smith,* 775 F. Supp. 172, 180-81 (E.D. Pa. 1991); *Truong v. Northrop Corporation,* 728 F.

Supp. 615, 618-620 (C.D. Cal. 1989); Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act,* 57 U. Chi. L. Rev. 543, 563-70 (1990). Moreover, this theory comports with federal practice. Federal courts routinely find that fraud claims are assignable. *See Amerifirst Bank v. Bomar,* 757 F. Supp. 1365, 1370-71 (S.D. Fla. 1991) (10b-5 claims assignable); *Federal Deposit Ins. Corp. v. Main Hurdman,* 655 F. Supp. 259, 266-68 (E.D. Cal. 1987) (bank's actions for fraud and malpractice assignable to FDIC); *In re National Mortg. Equity Corp.,* 636 F. Supp. 1138, 1152-56 (C.D. Cal. 1986) (RICO treble damage claims assignable). In addition, federal courts consistently recognize that an assignee of a fraud claim can assert his claim despite being unable to satisfy traditional standing requirements. *Amerifirst Bank,* 757 F. Supp. at 1370; *Main Hurdman,* 655 F. Supp. at 267. *See also National Ass'n of Realtors v. Nat. Real Est. Ass'n,* 894 F.2d 937, 941 (7th Cir. 1990).

Boeing and amici curiae argue that it strains reason to suggest that Congress was attempting to make a legal assignment through the FCA. They emphasize that the word "assignment" does not appear in the statute, and that no other language suggests that Congress was attempting to bestow a contractual right on the plaintiffs.

We disagree. It is well established that terms of art are not required for a valid assignment. "[T]he assignor need not even use the word 'assign'." Allan E. Farnsworth, *Contracts* § 11.3, at 786 (2d ed. 1990). Instead, the parties' intent controls. *Klamath-Lake Pharm. v. Klamath Med. Serv. Bureau,* 701 F.2d 1276, 1283 (9th Cir.), *cert. denied,* 464 U.S. 822 (1983). We conclude that Congress intended to assign the government's fraud claims to individual qui tam plaintiffs in cases where the government itself chooses not to pursue such claims. The express language of the FCA gives relators the right to bring suit on behalf of the government. Moreover, the entire purpose of the FCA's qui tam provisions is to em-

ploy the help of individuals to uncover fraud against the government.

We are unconcerned that the assignment of the government's claim is contingent on a qui tam plaintiff filing suit, that the qui tam plaintiff is only assigned part of the government's claim, and that the government retains the right to intervene. Assignments can be made conditional on the occurrence of a future event. Farnsworth, § 11.3, at 789. In addition, the fact that the relator is only entitled to a maximum of thirty percent of the total recovery of a qui tam suit is insignificant. This court has observed that "[a]n assignment of claims does not prevent the assignors from receiving the benefits of the litigation." *Klamath-Lake Pharm.*, 701 F.2d at 1282. Finally, the government's retention of the right to intervene in a relator's action upon a showing of good cause is completely consistent with the rule that an assignment may be limited in its effect. Farnsworth, § 11.3, at 789.

2. *Policy Concerns.*

Thus, we hold that the FCA's qui tam provisions do not run afoul of Article III. Consideration of the policy concerns underlying the standing doctrine supports this conclusion. In *Allen v. Wright,* 468 U.S. 737, 752 (1984), the Supreme Court explained that "the law of Art. III standing is built on a single basic idea—the idea of separation powers." Standing ensures that federal courts maintain their properly limited role in a democratic society by requiring that cases are presented in an adversarial context and in a form historically viewed as capable of judicial resolution. *Flast v. Cohen,* 392 U.S. 83, 95 (1968).

Qui tam suits are presented in the traditional adversarial context. They involve concrete factual disputes which prevent the federal courts from being converted into "judicial versions of college debating forums" issuing abstract opinions. *Valley Forge Christian College v.*

Americans United for the Separation of Church and State, Inc., 454 U.S. 464, 473 (1982). In addition, qui tam plaintiffs have the requisite personal stake in the outcome of the case to ensure that the issues are presented sharply and that more than "the vindication of the value interests of concerned bystanders" is at issue. *Id.* This personal stake derives from the following three factors: (1) the qui tam plaintiff must fund the prosecution of the FCA suit; (2) the qui tam plaintiff receives a sizable bounty if he prevails in the action; and (3) the qui tam plaintiff may be liable for costs if the suit is frivolous. *Kreindler & Kreindler*, 985 F.2d at 1154.

Qui tam suits also are capable of judicial resolution. They involve allegations of fraud—an area of law that is neither novel nor extraordinarily complex. By resolving these suits, federal courts are not intruding into areas committed to the other branches of government. Instead, they are merely accommodating a congressional policy decision that relators may sue on behalf of the government for violations of the FCA. As we explain more fully in the next section of this opinion, in no way does this upset the tripartite allocation of power upon which our government is based. *Givler*, 775 F. Supp. 172, 180-81.

B. *Separation of Powers.*

We next consider whether the qui tam provisions of the FCA violate the principle of separation of powers. The FCA's grant of authority to private parties to sue in the name of the United States for injuries to the federal treasury is certainly anomalous with respect to normal divisions of authority. But the question in this case is not whether the qui tam provisions fit neatly into usual public power distribution patterns; rather, the question is whether the Constitution *prohibits* use of this mechanism of civil law enforcement. To answer that question, we must determine whether Congress, under its policymaking

authority, may place the prosecution of claims based on injuries to the government under the direction of qui tam relators.[5] In other words, we must decide whether the separation of powers principle inherent in the structure of the Constitution proscribes assignment of this essentially prosecutorial function to private parties.

1. General Principles.

The principle that the various powers of government must be separated and assigned to coordinate branches is fundamental to our form of government. The Framers, aware that concentration of power breeds tyranny, embedded the separation of powers principle into the Constitution in order to preserve liberty. The Supreme Court has repeatedly pronounced upon the importance of this principle in our constitutional scheme. *See e.g., Mistretta*, 488 U.S. at 380 ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); *Morrison v. Olson*, 487 U.S. 654, 693 (1988) ("Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches."); *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2634 (1991); *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2310 (1991).

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[5] In *United States, ex. rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943), the Supreme Court held, referring to the FCA qui tam provisions, that "Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it. . . ." We do not believe this to be conclusive authority on the questions we address in this opinion for several reasons: the Court did not squarely face the constitutional issues presented in our case; the Court's jurisprudence regarding these issues has developed significantly since 1943; and Congress has substantially amended the FCA twice since the *Hess* decision.

The Supreme Court has also consistently recognized that "the Constitution by no means contemplates total separation" of the three branches of government. *Buckley v. Valeo,* 424 U.S. 1, 121 (1976). Because the Court has acknowledged that a workable government requires a degree of interdependence and overlapping responsibility, the Court has "never held that the Constitution requires that the three branches of Government 'operate with absolute independence.' " *Morrison,* 487 U.S. at 694 (quoting *United States v. Nixon,* 418 U.S. 683, 707 (1974)). Nevertheless, the Court has "not hesitated to invalidate provisions of law which violate" the separation of powers principle. *Id.* at 693; *Buckley,* 424 U.S. at 123. We understand that, likewise, we must not hesitate to do so.

This case does not involve the type of separation of powers problem posed by one branch of government arrogating power at the expense of another. *See Mistretta,* 488 U.S. at 382 ("It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.' ") (citation omitted); *Morrison,* 487 U.S. at 693; *Freytag,* 111 S. Ct. at 2638. Instead, this case requires us to determine the extent to which the legislative branch may, while remaining within constitutional boundaries, diminish the executive branch's authority without taking any of that authority as its own.

The Supreme Court has recognized that the separation of powers doctrine can be violated by "provisions of law that *either* accrete to a single Branch powers more appropriately diffused among separate Branches *or* that undermine the authority and independence of one or another coordinate Branch." *Mistretta,* 488 U.S. at 382 (emphasis added). It is the second type of violation that is at issue in this case. Although the Supreme Court has had occasion to address whether an act of Congress has

triggered this type of violation, *see Commodity Futures Trading Commission v. Schor,* 478 U.S. 833, 856-57 (1986) (case raised no question of congressional aggrandizement but instead question whether Congress impermissibly undermined role of judicial branch); *Morrison,* 487 U.S. at 694 ("We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."), it has never considered a situation where Congress has sought to disperse some quantum of executive authority amongst the general public.

2. Applicable Tests.

The Supreme Court has established that where an act of Congress arguably threatens the integrity of another branch's authority and independence, the proper separation of powers inquiry is whether Congress has "impermissibly undermined" the role of that branch. *Schor,* 478 U.S. at 856. This is the test which we apply to the qui tam provisions of the FCA. In order words, we must consider whether the qui tam provisions " 'disrupt[] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.' " *Morrison,* 487 U.S. at 695 (quoting *Nixon v. Administrator of General Services,* 433 U.S. 425, 443 (1977)). To determine whether the qui tam provisions undermine the role of the Executive Branch, we must decide whether, within the meaning expressed in *Morrison,* these provisions accord the Executive Branch "sufficient control" over the conduct of relators to "ensure that the President is able to perform his constitutionally assigned duties." [6] *Morrison,* 487 U.S. 696.

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[6] For purposes of this case, the relevant presidential duty is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3,

3. Comparison to *Morrison v. Olson*.

The authority most analogous to this case is *Morrison v. Olson*, in which the Supreme Court held that the independent counsel provisions of the Ethics in Government Act do not impermissibly interfere with the functions of the Executive Branch in violation of the separation of powers principle. 487 U.S. at 697. *Morrison* provides a baseline against which we may assess whether Congress has unconstitutionally diminished executive power by permitting private plaintiffs to sue in the name of the United States for an injury to the federal treasury. Comparison to *Morrison* is particularly useful because that case considers the degree to which Congress may assign prosecutorial powers to persons not under the direct control of the Executive Branch.

Before comparing the qui tam provisions of the FCA to the independent counsel provisions of the Ethics in Government Act, we must address Boeing's contention that *only* the Executive Branch has the power to enforce laws, and therefore to prosecute violations of law.[7] It is clear to us that no such absolute rule exists. *Morrison* itself indicates otherwise because that decision validated the independent counsel provisions of the Ethics in Government Act even though it recognized that "[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him,

[7] To support this proposition, Boeing cites dicta from several cases, including *Buckley*, 424 U.S. at 138 ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' "), and *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.") We note that the Court in those cases was concerned with congressional encroachment on executive powers, and did not have before it any question (such as that presented here) concerning the role of private parties in an enforcement scheme.

the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." 487 U.S. at 695. The Court also stated in *Morrison* that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that *typically* have been undertaken by officials within the Executive Branch." 487 U.S. at 691 (emphasis added). Use of the word "typically" in that sentence, considered in light of the Court's ultimate conclusion upholding the independent counsel provisions, must mean that prosecutorial functions need not *always* be undertaken by Executive Branch officials. *See* Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Farmers' Intent*, 99 Yale L.J. 1069, 1070 (1990) (Framers intended that prosecution would be undertaken by but not constitutionally assigned to executive officials, and that such officials would typically but not always prosecute). Thus, we reject Boeing's assertion that *all* prosecutorial power of any kind belongs to the Executive Branch.

Both sides in this litigation compare the degree of executive control over independent counsels to the degree of executive control over qui tam relators, yet they reach opposite conclusions. Boeing contends that *Morrison* stands at the outer limits of congressional authority to insulate government litigation from presidential control. Even accepting that proposition as true, however, we conclude that the FCA qui tam provisions do not exceed those limits. That is, the FCA permits a degree of executive control sufficient to satisfy the *Morrison* standard.

Each side in this case proposes a different approach to comparing the qui tam provisions to the independent counsel provisions. Boeing suggests that we should look at the precise means of executive control identified and found sufficient in *Morrison*, and then base our decision on the absence of those same means in the qui tam provisions. Kelly, on the other hand, suggests that we iden-

tify all possible means of executive control in the qui tam provisions, and then compare them *in toto* to the means of control identified in *Morrison*. We believe that, under *Morrison*, Kelly's approach is the correct one. Twice in *Morrison* the Court stated that the proper inquiry is whether the Act "taken as a whole" violates the principle of separation of powers by unduly interfering with the President's constitutional role. 487 U.S. at 685, 693. Thus, Morrison instructs us to compare the qui tam provisions "as a whole" to the independent counsel provisions "as a whole".

The powers of an independent counsel are quite broad. "With respect to all matters within the independent counsel's jurisdiction, the Act grants the counsel 'full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice.'" *Morrison*, 487 U.S. at 662, citing 28 U.S.C. § 594(a). The counsel's functions and powers include conducting grand jury proceedings and other investigations, initiating and conducting civil and criminal litigation, accepting referrals of matters from the Attorney General, framing and signing indictments, filing informations, appealing decisions, and handling all aspects of any case "in the name of the United States." 487 U.S. at 662. The counsel may also draw on public resources by appointing employees, and requesting and obtaining assistance from the Department of Justice. *Id.* In addition, "whenever a matter has been referred to an independent counsel under the Act, the Attorney General and the Justice Department are required to suspend all investigations and proceedings regarding the matter." *Id.* at 662-63, citing 28 U.S.C. § 597(a).

The powers of a qui tam relator vary depending on whether and when the government takes over the qui tam action. First, when a relator proceeds with a case in which the government has not intervened, the relator

exercises the broadest possible authority the FCA permits. Such a relator has full power to conduct litigation of the particular case in the name of the United States, but only with the resources of a private plaintiff and subject to possible discovery limitations. Also, a relator who pursues a frivolous action can be ordered to pay the defendant's costs and attorneys' fees. On the other hand, when the government takes over a qui tam case from the outset, the FCA explicitly accords the government primary authority to conduct the case. Finally, when the government intervenes late in the action, a fair interpretation of the statute is that the government has a similar degree of control over the litigation as if it had intervened at the start.[8] In comparison to any of these three situations, an independent counsel exercises broader investigative authority, prosecutorial discretion, and authority to use the resources of the U.S. government than does a qui tam relator.

Morrison identifies several means by which the Executive Branch can control an independent counsel's exercise of the powers outlined above. First, no independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request an appointment is unreviewable. Second, the Attorney General retains the power to remove an independent counsel, though only upon a showing of

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[8] As mentioned in Part I.B. of this opinion, the parties dispute whether the government exercises the same degree of authority whether it intervenes at the outset or later. The statute is ambiguous on this point, but can, if necessary to preserve the constitutionality of the statute, be read to provide the government the same authority to dismiss or settle the suit regardless of when it intervenes. *See Morrison*, 487 U.S. at 682 (regarding interpretation of a provision not tested in practice, Court noted that "it is the duty of federal courts to construe a statute in order to save it from constitutional infirmities . . . and to that end we think a narrow construction is appropriate here."); *Schor*, 478 U.S. at 841 (courts must construe federal statutes so as "to avoid serious doubt of their constitutionality") (internal quotation omitted).

"good cause." The Act requires the Attorney General to submit a report to the Judiciary Committees of the House and the Senate and to a special court responsible for appointing independent counsels specifying the grounds for removal. *Morrison*, 487 U.S. at 663 (citing 28 U.S.C. § 596(a)(2)). The Attorney General's removal authority is further limited by the Act's provision that an independent counsel can obtain judicial review of the Attorney General's removal action by filing a civil suit. The Act authorizes the reviewing court to grant reinstatement or "other appropriate relief." *Id.* at 663-64 (citing 28 U.S.C. § 596(a)(3)).

Third, the independent counsel's "jurisdiction" is defined with reference to the facts submitted by the Attorney General upon requesting an appointment. However, it is the special court charged with appointing an independent counsel that actually defines the counsel's prosecutorial jurisdiction. *Id.* at 661 (citing 28 U.S.C. § 593 (b), 679.[9] Finally, the Act requires the counsel to abide by Department of Justice policies, unless it is not possible to do so. *Morrison*, 487 U.S. at 696. The Court concluded that these features give the Executive Branch "*sufficient control* over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.* (emphasis added). We note that the Court reached this conclusion despite the fact that the Attorney General's unreviewable discretion to request appointment of an independent counsel is the only unconditional means of executive control which the Ethics in Government Act provides.

Under the FCA, the Executive Branch can control a qui tam relator's exercise of prosecutorial powers in several ways. The government can intervene in a case and

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[9] The Court held in *Morrison* that Article III does not prohibit Congress from vesting the Judicial Branch with power to define an independent counsel's jurisdiction as an incident to its power to appoint an independent counsel. *Id.* at 678-79.

then take primary responsibility for prosecuting the action; it can seek judicial limitation of the relators participation; it can move for dismissal of a case which it believes has no merit,[10] after notice to the relator and opportunity for a hearing; it can seek a judicial stay of the relator's discovery regardless of whether it intervenes; and it remains free to seek any alternate remedies available, including through any administrative proceeding. 31 U.S.C. § 3730(c).

Several of the control mechanisms built into the qui tam provisions are qualified. For example, the government may dismiss an action in which it has intervened only after an objecting relator has had an opportunity for a hearing,[11] and may settle with a defendant only after

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[10] At least one district court has interpreted the FCA to permit the government to move for dismissal of a qui tam action without actually intervening in the case. *Juliano v. Federal Asset Disposition Ass'n*, 736 F. Supp. 348 (D.D.C. 1990), *aff'd*, 959 F.2d 1101 (D.C. Cir. 1992). After four months of investigating Juliano's claims, the government filed a notice that it declined to take over the action as to some defendants, and that it moved to dismiss the others. *Id.* at 349. The court stated that in order to avoid serious constitutional questions which unduly curtailing the Attorney General's prosecutorial discretion would raise, it would interpret the Act's provision that the "Government may dismiss the action notwithstanding the objections" of the relator to apply to actions in which the government has not already intervened. *Id.* at 351. As the court aptly pointed out, the Act nowhere prohibits such an interpretation. *See id.* Though the specific question addressed in *Juliano* is not directly before us, we believe that the court's interpretation of the FCA is entirely appropriate and provides an illustration of the meaningful control which the Executive Branch can exercise over qui tam actions.

[11] It is not clear whether in practice this notice and hearing requirement has amounted to much of a hurdle for the government. However, we note that Congress apparently intended that the provision authorizing relators to formally object to any motions to dismiss or proposed settlements between the government and defendant should not pose a significant burden for the government

a court has determined that the proposed settlement is "fair, adequate, and reasonable under all the circumstances." [12] 31 U.S.C. § 3730(c)(2)(A), (B). Furthermore, the government must show "good cause" in order to intervene in an action which has already commenced. *Id.* § 3730(c)(3). However, the only unqualified control built into the independent counsel provisions is that the Attorney General has unreviewable discretion to request appointment of a counsel, and therefore to initiate litigation by a counsel. Boeing argues that the power to initiate litigation is an important and exclusively executive

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or courts. The Senate Judiciary Committee Report on the version ultimately passed of the 1986 amendments to the FCA stated:

> Any objections filed by the *qui tam* plaintiff may be accompanied by a petition for an evidentiary hearing on those objections. The Committee does not intend, however, that evidentiary hearings be granted as a matter of right. We recognize that an automatic right could provoke unnecessary litigation delays. Rather, evidentiary hearings should be granted when the *qui tam* relator shows a "substantial and particularized need" for a hearing. Such a showing could be made if the relator presents a colorable claim that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary and improper considerations.

Senate Judiciary Committee, False Claims Amendments Act of 1986, S. Rep. No. 345, 99th Cong., 2d Sess. 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.

[12] Significant precedent exists for the requirement that a court approve the government's decision to terminate a case brought on behalf of the United States. For example, Federal Rule of Criminal Procedure 48(a) requires the government to obtain leave of court to terminate a prosecution by dismissing an indictment, information or complaint. In addition, the government may settle a criminal case by plea bargain only with court approval. And finally, a court may enter a consent judgment proposed by the government in an antitrust action only if it is in the public interest. *See United States, ex rel. Truong v. Northrop Corp.*, 728 F. Supp. 615, 622 (C.D. Cal. 1989); *United States, ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1093 (C.D. Cal. 1989).

function.[13] Clearly, the government has greater authority to prevent the initiation of prosecution by an independent counsel than by a qui tam relator. But once prosecution has been initiated, the government has greater authority to limit the conduct of the prosecutor and ultimately *end* the litigation in a qui tam action than it does in an independent counsel's action.[14] We conclude that because the Executive Branch has power, albeit somewhat qualified, to end qui tam litigation, it is not significant that it can not prevent its start.

The Court in *Morrison* noted that even though the mechanisms just discussed give the Executive Branch sufficient control over an independent counsel, it "is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." *Morrison,* 487 U.S. at 695. The Court specifically pointed out that the Act does not allow the Attorney General to appoint the individual of his or her choice, to determine the counsel's jurisdiction, or to remove a counsel at will. *Id.* at 695-96. Likewise, we do not deny that the qui tam provisions of the FCA to some degree diminish

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[13] Boeing supports this proposition by citing to dicta in two cases, i.e., *Heckler v. Chaney,* 470 U.S. 821, 832 (1985) ("the decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch."), and *United States v. Nixon,* 418 U.S. 683, 693 (1974) (Court noted the argument of President's counsel that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"). We do not believe these comments amount to an absolute rule that only executive officers may initiate any type of litigation in the name of the United States.

[14] The Attorney General can do no more than suggest to a court that it terminate the office of an independent counsel. *Morrison,* 487 U.S. at 664. By comparison, the government "may dismiss" a qui tam action "notwithstanding the objections" of the relator, as long as the relator has received notice and an opportunity for a hearing. 31 U.S.C. § 3730(c)(2)(A).

Executive Branch control over the initiation and prosecution of a defined class of civil litigation. Nonetheless, we find that the Executive Branch exercises at least an equivalent amount of control over qui tam relators as it does over independent counsels.[15] Thus, the FCA gives the Attorney General sufficient means of controlling or supervising relators to satisfy separation of powers concerns.

In addition to considering whether the Ethics in Government Act taken as a whole violates the separation of powers principle, the Court in *Morrison* also specifically addressed whether the provision of the Act restricting the Attorney General's power to remove an independent counsel, taken by itself, impermissibly interferes with the President's exercise of his functions. 487 U.S. at 685. The Court held in *Morrison* that the "good cause" restriction on the Attorney General's power to remove an independent counsel does not violate separation of powers. *Id.* at 693. The essence of the Court's removal analysis in *Morrison*, based on its interpretation of prior removal jurisprudence, is an inquiry into whether Congress has impermissibly encroached on executive power by limiting presidential removal authority. *Id.* at 685-93. *See also Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws."). The Court found no such encroachment evident in the independent counsel provisions. *Morrison*, 487 U.S. at 691.

In light of the attention paid to the removal issue in *Morrison*, we have considered whether the lack of a provision permitting the government to "remove" a relator invalidates the qui tam provisions. Short of dismissing a

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[15] The "jurisdiction" of a relator seems necessarily limited by the terms of the False Claims Act and the facts of the particular case; thus the fact that the Attorney General plays a role in defining an independent counsel's jurisdiction but not a relator's does not set the two Acts apart.

qui tam action, the government can only seek *limitation* of a relator's participation in a case. 31 U.S.C. § 3730 (c)(2)(C). However, the concept of removal does not make sense in the qui tam context, in which there is no "office" from which to remove the relator and subsequently fill with someone else. *Cf. Morrison*, 487 U.S. at 664 (discussing procedures for terminating the "office" of an independent counsel). In contrast to independent counsels, relators are not replaceable. *Cf. id.* at 662 n. 5 (special court which appoints independent counsels authorized under 28 U.S.C. § 593(e) to fill vacancies due to death, resignation or removal of an independent counsel). The only practicable way to "remove" a relator is to end the qui tam litigation—and this the government has power to do. While the government's power to end qui tam litigation is qualified, so is the government's power to remove an independent counsel; [16] thus, these aspects of the two Acts are not meaningfully distinguishable for purposes of separation of powers analysis.

4. Judicial Encroachment.

We have discussed in the preceding the central separation of powers issue presented to us in this appeal—that is, whether Congress has impermissibly undermined the role of the Executive Branch by permitting private parties to exercise some measure of prosecutorial authority. We must also resolve a distinct, but in this case less

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[16] In holding that Congress's imposition of a "good cause" standard for removal does not unduly trammel on executive authority, the Court stated:

> Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.

Morrison, 487 U.S. at 691-92.

difficult, separation of powers problem: whether the qui tam provisions disrupt the proper balance of power between the three branches by permitting the Judicial Branch to encroach on executive authority. We recognize the general rule that under Article III, courts may not exercise "executive or administrative duties of a non-judicial nature." *Buckley*, 424 U.S. at 123. The purpose of this rule is "to maintain the separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches." *Morrison*, 487 U.S. at 680-81.

Boeing argues that the FCA gives federal courts too much control over whether the government may intervene later in a qui tam action which it initially declined to take over, because the Act requires the government to demonstrate "good cause" to do so. Boeing asserts that the "good cause" hurdle significantly interferes with the government's prosecutorial authority. Boeing attempts to support that assertion by noting that the court denied the government's intervention request in one out of only two cases of which it is aware in which the government has sought late intervention.[17] Boeing further argues that the FCA impermissibly grants the judiciary approval authority over government decisions to dismiss qui tam suits.

We conclude that the judicial involvement which the FCA authorizes does not contravene the separation of powers principle. First, in the absence of any meaningful indication that these requirements pose significant barriers to the Executive Branch's exercise of its prosecutorial authority, we see no reason to construe them as such and thereby heighten constitutional concerns. *See*

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[17] Unfortunately, Boeing did not provide us with a name or citation for that one case; thus, we are unable to verify whether the court did in fact deny the government's request for intervention or to consider the court's reasoning.

note 8. Second, as we noted earlier, ample precedent exists for judicial oversight of the government's decision to dismiss a qui tam action. *See* note 12.

Furthermore, the extent of judicial involvement in the qui tam scheme is no greater than the extent of judicial involvement in implementation of the independent counsel provisions of the Ethics in Government Act. The Court in *Morrison* held that the Constitution permits Congress to vest power in a special federal court to decide whom to appoint to the office of independent counsel, as well as to define a counsel's jurisdiction and perform a variety of other functions which, though "essentially ministerial," do require the exercise of some judgment and discretion. *Morrison,* 487 U.S. at 676-81. The Court also held that the special court's power to terminate the office of independent counsel is not a significant judicial encroachment on executive authority, even though it is not a typically judicial power and "has few analogues among the court's more traditional powers." *Id.* at 682. The Court explicitly construed the termination provision narrowly "in order to save it from constitutional infirmities," though it acknowledged that "an adventurous special court" conceivably could use its termination power aggressively. *Id.*

In light of *Morrison,* we believe it is not dispositive that no direct analogue exists for judicial authority to determine whether the government has demonstrated good cause to take over a case prosecuted in the name of United States.[18] This power may affect the government's prosecutorial discretion to some degree, but it does not amount to the power to supervise the prosecutorial conduct of either the Attorney General or a relator. *Cf.*

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[18] Federal courts do, however, routinely make evaluations which are similar to the intervention determination under the FCA. *See* Federal Rule of Civil Procedure 24(b) (permissive intervention). Of course, Rule 24(b) determinations do not raise the Article III concerns we address here.

Morrison, 487 U.S. at 681 ("The Act simply does not give the [special court] the power to 'supervise' the independent counsel in the exercise of his or her investigative or prosecutorial authority.") By comparison, we note that *Morrison* approved a scheme in which the Attorney General relinquishes *all* unqualified prosecutorial discretion with respect to a matter referred to an independent counsel once he or she has decided to request appointment of a counsel. Moreover, *Morrison* specifically held that the provision that the Attorney General must show "good cause" to remove an independent counsel and that the removal decision is subject to judicial review does not offend constitutional principles by permitting excessive judicial involvement. *Id.* at 691.

Considering the matter with a practical eye, *cf. Schor*, 478 U.S. at 851 ("[I]n reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."), we conclude that the FCA does not authorize the judiciary to infringe on prosecutorial authority to a degree beyond the bounds established in *Morrison*. The government's authority to intervene at the outset of an action is unfettered; we have seen no indication that it is difficult for the government to show good cause to intervene late; and, in view of analogous authority, judicial oversight of the government's dismissal power is unremarkable.

5. Conclusion.

Taken as a whole, and considering the removal issue in particular, the FCA affords the Executive Branch a degree of control over qui tam relators that is not distinguishable from the degree of control the *Morrison* Court found the Executive Branch exercises over independent counsels. Therefore, we conclude that the qui tam provisions of the FCA do not "impermissibly inter-

fere" with the President's exercise of his constitutionally assigned duties. Nor do the provisions disrupt the "proper balance" between the branches, because, like the Ethics in Government Act, the FCA permits the Executive Branch to retain "sufficient control" over prosecutorial functions.[19] Finally, the provisions do not authorize constitutionally impermissible judicial encroachment on executive power.

C. *Appointments Clause.*

The third constitutional question we consider is whether the qui tam provisions of the FCA violate the Appointments Clause.[20] This case does not present the usual situation raising an Appointments Clause problem —that is, where the power to appoint is placed in the hands of the wrong branch or governmental entity. In other words, this case does not present a question of improper diffusion or arrogation of appointment power. Rather, it requires us to inquire whether completely *unappointed* qui tam relators wield so much governmental power that they *must* be appointed in conformity with the Appointments Clause.

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[19] Boeing raises the specter of Congress enacting an unlimited series of qui tam provisions if this court finds the qui tam provisions in the FCA to be constitutional. However, this pure speculation about the policy choices Congress might attempt to make does not weigh into our constitutional analysis. Furthermore, it is unlikely that in other areas of civil law enforcement a similarly concrete, identifiable injury to the U.S. treasury as exists in the FCA context would exist as a basis for standing.

[20] Art. II, § 2, cl. 2 of the U.S. Constitution provides: "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

The purpose of the Appointments Clause is to limit congressional discretion to disperse the power *to appoint*, and thereby preserve the Constitution's structural integrity. *Freytag*, 111 S. Ct. at 2638-39, 2641-42. Under *Buckley*, persons who are not appointed by a body with proper appointment authority, and who therefore can not be considered "Officers of the United States," may not discharge functions that are properly discharged only by "officers". 424 U.S. at 140. The test which *Buckley* provides to assess whether persons exercise authority which can only properly belong to appointed "officers" is whether those persons "exercis[e] significant authority pursuant to the laws of the United States." *Id.* at 126. The Court held in *Buckley* that statutory provisions vesting in the Federal Election Commission "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" violate the Appointments Clause because only officers may perform such functions. *Id.* at 140.

The appropriate questions in this case, therefore, are whether qui tam relators exercise "significant authority" under the FCA, and whether the FCA vests in relators "primary responsibility" for enforcing the Act by litigating in the federal courts. Our answers to these questions follow logically from our determination, explained in Section III.B., that the qui tam provisions do not violate the separation of powers principle. We have concluded that the Executive Branch retains "sufficient control" of relators such that their exercise of authority to sue on behalf of the United States does not "impermissibly undermine" executive functions. In keeping with that conclusion, we find it impossible to characterize the authority exercised by relators as so "significant" that it must only be exercised by officers appointed in the manner which Article II, § 2, cl. 2 prescribes. *See Buckley*, 424 U.S. at 126. Linking our Appointments Clause and separation of powers analyses in this manner is appropriate in light of the fact that the Supreme Court has

interpreted the Appointments Clause to serve the purpose of maintaining the separation of powers in the constitutional scheme. *Freytag*, 111 S. Ct. at 2638, 2641 ("The principle of separation of powers is embedded in the Appointments Clause."); *See Buckley*, 424 U.S. at 120, 124.

Boeing and amici supporting its position argue, citing *Buckley*, that only officers of the United States may litigate on behalf of the government. We do not believe *Buckley* can fairly be read to state an unequivocal rule that only officers may exercise any prosecutorial authority in the name of the United States. Instead, *Buckley*, properly construed, directs only that persons who have "primary responsibility" and "significant authority" to enforce a law through litigation must be considered officers. *Buckley*, 424 U.S. at 126, 140.

As Kelly correctly points out, the qui tam provisions do not contravene *Buckley*'s rule. The fact that relators sue in the name of the government does not vest them with any governmental powers; they conduct litigation under the FCA with only the resources of private plaintiffs. Furthermore, relators have no greater authority to enforce the FCA than does the Attorney General, and under the terms of the statute must yield to the government's assumption of "primary responsibility" when it elects to intervene in a qui tam action. 31 U.S.C. § 3730 (c)(1). When the government does not intervene, a relator retains primary responsibility for the litigation, thus presenting what may seem a close question under *Buckley*; but even in that situation, the relator's responsibility only extends to a single case, and the relator's activities can still be limited by the court upon the request of either the government or the defendant.[21] Thus, the

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[21] In addition, as the district court below pointed out, a relator "is not appointed by Congress, receives no federal salary, and serves for no specified term." Order denying dismissal at 7. These factors distinguish relators from "officers". *See Auffmordt v.*

qui tam scheme does not threaten the interest in preventing the exercise of unchecked or unbalanced government power which underlies the Appointments Clause. Moreover, the Court's central point in *Buckley* was that Congress may not arrogate power to itself by appointing officers who perform executive functions. The Court held that the Federal Election Commission could not exercise the powers conferred upon it precisely because Congress exceeded its authority by vesting itself with power to appoint the commissioners. *Buckley*, 424 U.S. at 143. Such concerns about congressional aggrandizement simply are not implicated in this case.

We conclude that a qui tam relator, who litigates only a single case, does not have "primary responsibility" within the meaning of *Buckley* for enforcing the FCA. Nor does a relator exercise authority so "significant" that the Constitution only permits an officer of the United States to exercise it. Therefore, the qui tam provisions do not violate the Appointments Clause.

D. *Due Process.*

The final question before us is whether the qui tam provisions of the FCA violate the Due Process Clause of the Fifth Amendment. Boeing argues that the FCA violates Boeing's right not to be deprived of property without due process[22] because it permits financially interested relators to prosecute the company on behalf of the government. Boeing contends that the Act's promise of a reward to relators for successful prosecution creates a conflict of interest between a relator's desire for pecuniary gain and duty as a prosecutor performing "govern-

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Hedden, 137 U.S. 310, 327 (1890) (person is not an "officer" within meaning of Appointments Clause where his "position is without tenure, duration, continuing emolument, or continuous duties").

[22] The Fifth Amendment to the U.S. Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

ment functions" to seek a just and fair result. Because the government is the real party in interest, Boeing asserts, a relator must "place justice above competing objectives." Brief of Appellant at 10.

Boeing does not cite persuasive authority for its position. In one case on which Boeing relies, *Marshall v. Jerrico*, 446 U.S. 238 (1980), the Supreme Court did state that a "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* at 249-50. However, the Court found *no* due process violation in the case before it, in which the Court determined that prosecutors enforcing the child labor provisions of the Fair Labor Standards Act had only an exceptionally remote financial incentive for securing civil penalties. *Id.* at 250. Thus, the Court explicitly declined to state the "limits there may be on a financial or personal interest of one who performs a prosecutorial function." *Id.* In addition, the Court noted that "[p]rosecutors need not be entirely 'neutral and detached' . . . . In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests . . . are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties." *Id.* at 248-49. Boeing's contention that the *Marshall* Court "strongly suggested" that the Due Process Clause prohibits civil prosecutions by financially interested prosecutors is exaggerated, and does not support a finding of a due process violation here.

Also, Boeing's reliance on *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), is misplaced. The Court held in *Young* that courts generally may appoint private attorneys to prosecute criminal contempt charges, but that the district court in the particular case before it erred in appointing attorneys who were counsel for an interested party in the underlying litiga-

tion. *Id.* at 793, 802. However, only Justice Blackmun in a concurring opinion stated that the error amounted to a due process violation. *Id.* at 815 (Blackmun, concurring). *Young*, in addition, is distinguishable from the present case in that it involved *criminal* prosecution, and therefore arguably required a higher level of prosecutorial disinterest than would be necessary in a civil enforcement action under the FCA. *See id.* at 808 (noting criminal nature of litigation in question).

Furthermore, the type of conflict of interest at issue in *Young* is simply not extent in the qui tam situation, where private and public goals are congruent. In *Young*, the Court observed that a private attorney appointed to prosecute a criminal contempt action "is appointed solely to pursue the public interest in vindication of the court's authority . . . [and] therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution." *Id.* at 804. But in the FCA context, Congress has created a scheme in which the interests of the private prosecutor (that is, the relator) coincide with the public interest in remedying harm to the federal treasury. Under the explicit terms of the Act, a qui tam action is taken on behalf of *both* the government and the relator, indicating that the two share a single interest in successful litigation. *See* 31 U.S.C. § 3730(b). Indeed, the only private interest at stake in a qui tam action is the interest which Congress has created in a reward for successful prosecution; thus the public's interest in successfully enforcing the FCA and the relator's private interest are intertwined rather than conflicting.

Moreover, contrary to Boeing's suggestion, it is not at all clear that qui tam relators are bound to fulfill the same type of public duty as government prosecutors. The statutory terms of the FCA do not impose such a duty, nor do relators owe a duty by virtue of holding a public "office". Furthermore, the fact that relators sue in the name of the United States does not mean that they wield governmental powers and therefore owe the same type of

duty to serve the public interest as government prosecutors. First, the fact that relators sue in the name of the government is significant only with respect to their standing to sue; based on the terms of the statute, in no way does this fact otherwise affect the conduct of qui tam litigation. Second, unlike public prosecutors, relators do not have the "power to employ the full machinery of the state in scrutinizing any given individual." *Young*, 481 U.S. at 814; *see id.* at 811 ("terrible array of coercive methods" is available to prosecutors, including police investigation and interrogation, warrants, immunized informers and agents, authorized wiretapping, civil investigatory demands, and enhanced subpoena power.) Qui tam relators pursue their claims essentially as private plaintiffs, except that the government may displace a relator as the party with primary authority for prosecuting an action. Thus, qui tam litigation does not implicate due process concerns.

IV. CONCLUSION

We conclude that the qui tam provisions of the False Claims Act do not conflict with Article III of the Constitution, nor violate the principle of separation of powers, the Appointments Clause, or the Due Process Clause.[23] Accordingly, we affirm the district court's denial of Boeing's motion to dismiss.

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[23] The parties and amici devote considerable attention to arguments concerning the historical pedigree of qui tam actions. The two sides in this case present conflicting portraits of that pedigree. Obviously, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). But historical factors can affect a court's decision where there is significant evidence of an "unambiguous and unbroken history" of practice dating from the framing of the Constitution. *Id.* at 790-92. The evidence presented by those urging affirmance in this case does not appear to rise to that level. In any event, because we find no constitutional violations here, we need not consider the historical arguments at all.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-36660

UNITED STATES OF AMERICA, *ex rel.*
KEVIN G. KELLY,
Plaintiff-Appellee,

v.

THE BOEING COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Washington

Argued and Submitted April 7, 1993
Decided Sept. 7, 1993

Before: HALL, WIGGINS and LEAVY, Circuit Judges.

CYNTHIA HOLCOMB HALL, Circuit Judge:

This appeal presents several constitutional challenges to the qui tam provisions of the False Claims Act, 31 U.S.C. §§ 3729 et seq. The question of the constitutionality of the qui tam provisions is one of first impression in this circuit. We hold that these provisions do not

exceed the limitations of Article III of the Constitution, nor do they violate the constitutional principle of separation of powers, the Appointments Clause of Article II, or the Due Process Clause of the Fifth Amendment.

I. OVERVIEW AND BACKGROUND

The Boeing Company ("Boeing") appeals the district court's denial of its motion to dismiss a qui tam action under the False Claims Act ("FCA" or "the Act"). Qui tam plaintiff Kevin G. Kelly filed the action against Boeing on behalf of the United States to recover damages and penalties for allegedly fraudulent charges to the United States. Boeing claimed in its motion to dismiss that the district court lacked jurisdiction over Kelly's suit because the provisions of the FCA which authorize qui tam actions are unconstitutional.

The district court rejected Boeing's four constitutional challenges to the FCA, but certified an interlocutory appeal of its rulings on the constitutional issues. We granted permission to appeal pursuant to 28 U.S.C. § 1292(b). We have considered and likewise rejected Boeing's arguments. Therefore, we affirm.

A. Facts and Proceedings Below.

In November 1989, Kelly, a former Boeing employee, filed a complaint under seal alleging that Boeing committed various violations of the False Claims Act related to its work as a subcontractor on the government's B-2 Bomber and Advanced Tactical Fighter programs. Kelly claimed that Boeing improperly charged to the government certain facilities lease costs. Kelly served his complaint on the government, as required under the Act, after which the government investigated his allegations for over three years. Upon completing its investigation, the government elected not to intervene in the case. The district court then unsealed the case, and Kelly served on Boeing an amended complaint. Boeing then moved to dismiss, raising the four constitutional challenges that it pursues

in this appeal. The district court denied Boeing's motion,[1] and certified the constitutional issues for immediate appeal to this court.

B. The Qui Tam Provisions of the FCA.

The FCA, which Congress originally enacted in 1863, is the government's "primary litigative tool for combatting fraud" against the federal government. Senate Judiciary Committee, False Claims Amendments Act of 1986, S.Rep. No. 345, 99th Cong., 2d Sess. 2 (1986), reprinted in 1986 U.S.C.C.A.N. 5266. The Act authorizes both the Attorney General and private persons to bring civil actions to enforce the Act. 31 U.S.C. § 3730 (1988). Congress amended the FCA in 1986 to increase the financial and other incentives for private individuals to bring suits under the Act and thereby to enlist the aid of the citizenry in combatting the rising problem of "sophisticated and widespread fraud." [2] S.Rep. No. 345 at 2, 23-24, reprinted in 1986 U.S.C.C.A.N. at 5267, 5288-89.

Section 3730(b) of the FCA as now constituted provides that a person may bring a civil action for a violation of the substantive provisions of the Act "for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. § 3730(b)(1). An action under this provision is

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[1] The district court granted Boeing's motion to dismiss a state law wrongful discharge claim included in Kelly's amended complaint. Kelly does not contest that ruling.

[2] The legislative history indicates that Congress sought to encourage more private enforcement of the FCA because "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity. Yet in the area of the Government fraud, there appears to be a great unwillingness to expose illegalities." S.Rep. No. 345 at 4, reprinted in 1986 U.S.C.C.A.N. at 5269.

termed a "qui tam" [3] suit, and the person who brings such an action is referred to as a "relator" or "informer." If the government files an action to enforce the FCA, a would-be relator may not later bring any action based on the same underlying facts. 31 U.S.C. § 3730(e)(3). Nor may a private party litigate a qui tam suit based on the public findings of a government investigation or on disclosures in the news media, unless that party is an original and independent source of the information on which the complaint is based. Id. § 3730(e)(4)(A)-(B).

Upon bringing a qui tam action, a relator must serve on the government a copy of the complaint and written disclosure of substantially all material evidence and information the relator possesses. The complaint must be filed in camera and remain under seal for at least 60 days so that the government may investigate the relator's allegations, though upon a showing of "good cause" the government may move the court for extensions of the 60 day period. Id. § 3730(b)(2), (3). By the end of the period provided for the government's investigation, the government must decide whether to intervene and proceed with the action, "in which case the action shall be conducted by the Government," id. § 3730(b)(4)(A), or whether to decline to take over the action, "in which case the person bringing the action shall have the right to conduct the action." Id. § 3730(b)(4)(B).

The Act explicitly provides that if the government takes over the qui tam action from the start, "it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action." Id. § 3730(c)(1). Though the relator "shall

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[3] The term "qui tam" is short for "qui tam pro domino rege quam pro se imposo sequitur," which is interpreted as "who brings the action as well for the king as for himself." Bass Anglers Sportsman's Soc'y of America v. U.S. Plywood-Champion Papers, Inc., 324 F.Supp. 302, 305 (S.D.Tex.1971).

have the right to continue as a party," id., the government may end the litigation or limit the participation of the relator in several ways. First, the government may dismiss the action "notwithstanding the objections of the person initiating the action" once the relator has received notice and an opportunity for a hearing on the dismissal motion. Id. § 3730(c)(2)(A). Second, the government may settle with the defendant "notwithstanding the objections of the person initiating the action," but only if the court determines after a hearing "that the proposed settlement is fair, adequate, and reasonable under all the circumstances." Id. § 3730(c)(2)(B). Third, the government may request that the court impose appropriate limitations on the relator's participation if it shows that unrestricted participation "would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment." Id. § 3730(c)(2)(C). The Act also provides the defendant an opportunity to request that the court limit the relator's participation, upon a showing that unrestricted participation "would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense." Id. § 3730(c)(2)(D).

When the government chooses not to take over a qui tam action, the relator "shall have the right to conduct the action." Id. § 3730(c)(3). Upon the government's request, however, the relator must serve the government with copies of all pleadings and deposition transcripts. Whether or not the government takes over the action from the outset, it may ask the court to stay the relator's discovery for an extendable 60-day period, upon a showing that the relator's discovery "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts." Id. § 3730(c)(4).

In cases where the government initially elects not to take over the action, the court "may nevertheless permit

the Government to intervene at a later date upon a showing of good cause." Id. § 3730(c)(3). In permitting late intervention, the court may not limit "the status and rights" of the relator. Id. The parties and amici in this appeal raise two questions concerning this particular aspect of the qui tam provisions. First, they dispute the height of the "good cause" hurdle. Second, they dispute the meaning of the proviso that the court may not limit the relator's "status and rights." Boeing claims that this proviso means the relator retains primary authority to conduct the action, whereas Kelly claims that this simply means the relator retains the right to participate as a party to the litigation.[4] Both questions relate to the broader issue, addressed in the discussion section of this opinion, concerning the extent of the government's ability to exert control over a qui tam suit.

The Act provides for a range of possible awards to successful qui tam plaintiffs. In actions which the government has taken over, the relator receives between 15 and 25 percent of the proceeds of the action or settlement of the claim. But if the court finds that the action is based primarily on information of which the relator is not the original source, the relator's award must be limited to no more than 10 percent of the proceeds or settlement. In actions in which the government has not intervened, the relator receives between 25 and 30 percent of the proceeds or settlement. In any of the above situations, the relator also receives an amount for reasonable expenses, attorneys' fees and costs, awarded against the defendant rather than taken out of the proceeds or settlement. Id. § 3730(d)(1), (2). On the other hand, an unsuccessful relator in a case in which the government has not intervened may be ordered to pay the defendant

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[4] Kelly argues that § 3730(c)(3) "simply secures the party status and percentage award to which the relator would have been entitled had he continued to litigate the case without government intervention."

its reasonable attorneys' fees and expenses if the court finds that the relator's claim "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." Id. § 3730(d)(4).

II. STANDARD OF REVIEW

We review de novo the purely legal question whether a statute is constitutional. Gray v. First Winthrop Corp., 989 F.2d 1564, 1567 (9th Cir.1993). We are mindful that we should invalidate an act of Congress only "for the most compelling constitutional reasons." Mistretta v. United States, 488 U.S. 361, 384, 109 S.Ct. 647, 661, 102 L.Ed.2d 714 (1989) (quoting Bowsher v. Synar, 478 U.S. 714, 736, 106 S.Ct. 3181, 3193, 92 L.Ed.2d 583 (1986) (Stevens, concurring in judgment)). Furthermore, we recognize that we are obliged whenever "fairly possible" to interpret a statute in a manner that renders it constitutionally valid. Communications Workers of America v. Beck, 487 U.S. 735, 762, 108 S.Ct. 2641, 2657, 101 L.Ed.2d 634 (1988). Our adherence to this principle of presumptive constitutionality is guided by our understanding that "[w]hen we are required to pass on the constitutionality of an Act of Congress, we assume 'the gravest and most delicate duty that this Court is called on to perform.' " Fullilove v. Klutznick, 448 U.S. 448, 472, 100 S.Ct. 2758, 2771, 65 L.Ed.2d 902 (1980) (citation omitted).

III. DISCUSSION

A. Standing

1. Article III Requirements

We first address the threshold question of justiciability —whether a qui tam plaintiff has standing to sue under the FCA. Article III, section 2 of the Constitution limits the judicial power of the United States to the resolution of cases and controversies. The doctrine of standing is

used to determine whether a conflict qualifies as a case or controversy and is therefore capable of judicial resolution. Lujan v. Defenders of Wildlife, —— U.S. ——, ——, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). Standing, in turn, is dependent on three conditions. First, the plaintiff must have suffered an "injury in fact." This consists of an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent. Second, there must be a causal connection between the injury and the conduct serving as the basis of the lawsuit. In other words, the injury has to be traceable to the challenged action of the defendant and not the result of the conduct of a third party not before the court. Third, it must be likely that the injury will be redressed by a favorable decision. Id.

Boeing and amici curiae argue that the only injuries implicated in qui tam suits are injuries to the federal treasury resulting from false claims against the United States. Qui tam relators do not suffer harm, and are therefore unable to establish the constitutional elements of standing. It follows that by granting standing to private parties, the FCA's qui tam provisions run afoul of Article III and are unconstitutional.

We disagree. As an initial matter, we think it is possible for a qui tam plaintiff to suffer sufficient harm to satisfy the injury in fact requirement of Article III. In many cases, qui tam plaintiffs will be unwilling participants in the alleged fraud. Under these circumstances, they are denied the benefit of working for an honest business. As the court in United States ex rel. Robinson v. Northrop Corp., 824 F.Supp. 830 (N.D.Ill.1993), explained, this is not an insignificant injury. The embarrassment and discomfort of working for a company that has allegedly perpetrated a fraud on the government can be quite substantial. Id. at 835.

In addition, qui tam plaintiffs are faced with the difficult choice of either remaining silent and being subject to

potential liability or reporting the fraud to a superior and suffering repercussions as severe as dismissal. We recognize that the potential harm flowing from this choice is too speculative to qualify as injury in fact.[5] However, we are convinced that the decision making process that an individual exposed to fraud is forced to engage in causes significant present harm. The stress, anxiety, and mental anguish caused by this dilemma satisfies the injury in fact requirement. The Supreme Court has long recognized that noneconomic and intangible injuries fulfill the injury in fact requirement. Sierra Club v. Morton, 405 U.S. 727, 734, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 636 (1972). Indeed, the Court has gone so far as to state that an "identifiable trifle" is enough to establish standing. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n. 14, 93 S.Ct. 2405, 2417 n. 14, 37 L.Ed.2d 254 (1973). "Accordingly, a showing of slight, non-economic injury is sufficient to confer standing." Murphy v. Bilbray, 782 F.Supp. 1420, 1425 n. 16 (S.D.Cal.1991), aff'd, Ellis v. City of La Mesa, 990 F.2d 1518 (9th Cir.1993). We hold that the injuries suffered by a qui tam plaintiff satisfy this standard.

Our conclusion is not undermined by the Supreme Court's statement in Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc., 454 U.S. 464, 485, 102 S.Ct. 752, 765, 70 L.Ed.2d 700 (1982), that the psychological consequence of observing conduct with which one disagrees is not an injury sufficient to confer standing under Article III. See also Asarco v. Kadish, 490 U.S. 605, 616, 109 S.Ct. 2037, 2044, 104 L.Ed.2d 696 (1989). The Supreme

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[5] See United States ex rel. Truong v. Northrop Corp., 728 F.Supp. 615, 619 n. 5 (C.D.Cal.1989), in which the district court held that the threat of prosecution and the chance of being fired, demoted or blackballed, do not constitute "actual" or "threatened" injury, but instead are more appropriately classified as "speculative" harm, which is insufficient to establish injury in fact.

Court's observation in Valley Forge does not foreclose the possibility of basing standing on psychological or mental harm. See e.g. Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1396-97 (9th Cir.1992) (members of an environmental group had standing to sue based on psychological injury suffered from viewing the killing of buffalo in Montana). Instead, the Court's language is properly understood to mean that the simple indignation or ideological objection caused by viewing certain conduct does not establish the injury in fact necessary for standing.[6] Cf. Harris v. City of Zion, Lake County, Ill., 927 F.2d 1401, 1405 (7th Cir.1991).

The harm a qui tam plaintiff suffers is far more severe than the harm at issue in Valley Forge. Fraud is illegal and reasonable people do not respond differently when exposed to such conduct. The shock, outrage and embarrasment experienced can be quite serious. Moreover, exposure to fraud is not a matter of simple indignation. The difficult choice a qui tam plaintiff faces when he becomes an unwilling participant in fraudulent activity directly affects his freedom of action. See Harris, 927 F.2d at 1405. Thus, the limitation articulated in Valley Forge is inapplicable here.

Nor is it significant that the alleged fraud harms a qui tam plaintiff less severely than the federal government. In Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972), the Supreme Court recognized that individuals who are not the primary victims of the illegal conduct at issue still have standing to sue. Id. at 210, 93 S.Ct. at 367. Trafficante involved

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[6] Other courts have limited the reach of Valley Forge. See. e.g., *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir.1989); Saladin v. City of Milledgeville, 812 F.2d 687 (11th Cir.1987); Hawley v. City of Cleveland, 773 F.2d 736 (6th Cir.1985) (holding that the psychological injury caused by direct, personal contact with religious displays or markings on public property was sufficient to establish standing).

the intentional exclusion of African-Americans from an apartment complex. Two members of the complex, one African-American and one Caucasian, brought suit against the owner of the complex pursuant to § 810 of the Civil Rights Act of 1968. The Supreme Court held that while the individuals who were excluded from the complex were "damaged the most," the plaintiffs had standing to sue. Id. They suffered injury in fact because they were denied the benefit of living in an integrated community and because they experienced the embarrassment of residing in a segregated building. Id. at 208, 93 S.Ct. at 366. Similarly, qui tam relators suffer injury in fact because they are denied the benefit of working for an honest business and experience the embarrassment of working for a company that allegedly perpetrated fraud on the government. See Robinson, 824 F.Supp. at 835.

In addition to suffering injury in fact, we conclude that it is possible for qui tam relators to satisfy the constitutional requirements of causation and redressability. The alleged fraud which is the subject of a qui tam suit is the 'but for' cause of the embarrassment and mental anguish a qui tam relator suffers. Furthermore, the relief requested is likely to remedy this harm in two ways. First, a verdict in the relator's favor distances him from the fraud and provides him with the moral satisfaction of knowing that he helped combat the unlawful activity. Second, the bounty compensates the relator for the harm he suffered and helps make him whole.

Thus, we hold that a qui tam relator can fulfill the three elements necessary for standing under Article III. Our inquiry does not end here, however. In addition to the constitutional requirements of standing, the courts have established certain self-imposed or prudential limitations on the exercise of their jurisdiction. First, the Supreme Court has held that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."

Warth v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). Second, the Court has refrained from adjudicating "generalized grievances" shared by all or a large class of citizens. Id. at 499-500, 95 S.Ct. at 2205-2206. Lastly, the Court has required that a plaintiff's complaint fall within the zone of interests protected or regulated by the statute or constitutional guarantee in question. Valley Forge, 454 U.S. at 475, 102 S.Ct. at ——.

It is possible to argue that one or more of these prudential limitations precludes conferring standing on qui tam plaintiffs. The Supreme Court has made clear, however, that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." Warth, 422 U.S. at 501, 95 S.Ct. at 2206. We believe that this was Congress's intent in enacting the qui tam provisions of the FCA. It follows that the judiciary's prudential hurdles are inapplicable, and that a qui tam plaintiff can seek relief on the basis of the legal rights and interests of others and may invoke the general public interest in support of his claim. Id.

2. Assignment

In the instant case, Kelly does not contend that he suffered embarrassment and mental anguish as a result of being exposed to Boeing's alleged fraudulent conduct. We do not think that this precludes him from bringing suit, however. Instead, we hold that an alternative ground for standing exists in qui tam suits. That is, the FCA effectively assigns the government's claims to qui tam plaintiffs such as Kelly, who then may sue based upon an injury to the federal treasury.

Under this alternative theory of standing, the FCA's qui tam provisions operate as an enforceable unilateral contract. The terms and conditions of the contract are accepted by the relator upon filing suit. If the government declines to prosecute the alleged wrongdoer, the qui tam

plaintiff effectively stands in the shoes of the government. Because the government clearly is capable of establishing injury-in-fact, causation, and redressability, qui tam plaintiffs satisfy these Article III requirements as well.

Several courts and commentators have embraced this assignment theory. See United States ex rel. Kreindler & Kreindler v. United Technologies Corporation, 985 F.2d 1148 (2d Cir.), cert denied, —— U.S. ——, 113 S.Ct. 2962, 125 L.Ed.2d 663 (1993); United States Dept. of Housing and Urban Develop. ex rel. Givler v. Smith, 775 F.Supp. 172, 180-81 (E.D.Pa.1991); Truong v. Northrop Corporation, 728 F.Supp. 615, 618-620 (C.D.Cal.1989); Thomas R. Lee, Comment, The Standing of Qui Tam Relators Under the False Claims Act, 57 U.Chi.L.Rev. 543, 563-70 (1990). Moreover, this theory comports with federal practice. Federal courts routinely find that fraud claims are assignable. See Amerifirst Bank v. Bomar, 757 F.Supp. 1365, 1370-71 (S.D.Fla.1991) (10b-5 claims assignable); Federal Deposit Ins. Corp. v. Main Hurdman, 655 F.Supp. 259, 266-68 (E.D.Cal.1987) (bank's actions for fraud and malpractice assignable to FDIC); In re National Mortg. Equity Corp., 636 F.Supp. 1138, 1152-56 (C.D.Cal.1986) (RICO treble damage claims assignable). In addition, federal courts consistently recognize that an assignee of a fraud claim can assert his claim despite being unable to satisfy traditional standing requirements. Amerifirst Bank, 757 F.Supp. at 1370; Main Hurdman, 655 F.Supp. at 267. See also National Ass'n of Realtors v. Nat. Real Est. Ass'n., 894 F.2d 937, 941 (7th Cir. 1990).

Boeing and amici curiae argue that it strains reason to suggest that Congress was attempting to make a legal assignment through the FCA. They emphasize that the word "assignment" does not appear in the statute, and that no other language suggests that Congress was attempting to bestow a contractual right on the plaintiffs.

We disagree. It is well established that terms of art are not required for a valid assignment. "[T]he assignor need not even use the word 'assign'." Allan E. Farnsworth, Contracts § 11.3, at 786 (2d ed. 1990). Instead, the parties' intent controls. Klamath-Lake Pharm. v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1283 (9th Cir.), cert. denied, 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983). We conclude that Congress intended to assign the government's fraud claims to individual qui tam plaintiffs in cases where the government itself chooses not to pursue such claims. The express language of the FCA gives relators the right to bring suit on behalf of the government. Moreover, the entire purpose of the FCA's qui tam provisions is to employ the help of individuals to uncover fraud against the government.

We are unconcerned that the assignment of the government's claim is contingent on a qui tam plaintiff filing suit, that the qui tam plaintiff is only assigned part of the government's claim, and that the government retains the right to intervene. Assignments can be made conditional on the occurrence of a future event. Farnsworth, § 11.3, at 789. In addition, the fact that the relator is only entitled to a maximum of thirty percent of the total recovery of a qui tam suit is insignificant. This court has observed that "[a]n assignment of claims does not prevent the assignors from receiving the benefits of the litigation." Klamath-Lake Pharm., 701 F.2d at 1282. Finally, the government's retention of the right to intervene in a relator's action upon a showing of good cause is completely consistent with the rule that an assignment may be limited in its effect. Farnsworth, § 11.3, at 789.

3. Policy Concerns.

Thus, we hold that the FCA's qui tam provisions do not run afoul of Article III. Consideration of the policy concerns underlying the standing doctrine supports this conclusion. In Allen v. Wright, 468 U.S. 737, 752, 104 S.Ct.

3315, 3325, 82 L.Ed.2d 556 (1984), the Supreme Court explained that "the law of Art. III standing is built on a single basic idea—the idea of separation powers." Standing ensures that federal courts maintain their properly limited role in a democratic society by requiring that cases are presented in an adversarial context and in a form historically viewed as capable of judicial resolution. Flast v. Cohen, 392 U.S. 83, 95, 88 S.Ct. 1942, 1950, 20 L.Ed.2d 947 (1968).

Qui tam suits are presented in the traditional adversarial context. They involve concrete factual disputes which prevent the federal courts from being converted into "judicial versions of college debating forums" issuing abstract opinions. Valley Forge, 454 U.S. at 473, 102 S.Ct. at 759. In addition, qui tam plaintiffs have the requisite personal stake in the outcome of the case to ensure that the issues are presented sharply and that more than "the vindication of the value interests of concerned bystanders" is at issue. Id. This personal stake derives from the following three factors: (1) the qui tam plaintiff must fund the prosecution of the FCA suit; (2) the qui tam plaintiff receives a sizable bounty if he prevails in the action; and (3) the qui tam plaintiff may be liable for costs if the suit is frivolous. Kreindler & Kreindler, 985 F.2d at 1154.

Qui tam suits also are capable of judicial resolution. They involve allegations of fraud—an area of law that is neither novel nor extraordinarily complex. By resolving these suits, federal courts are not intruding into areas committed to the other branches of government. Instead, they are merely accommodating a congressional policy decision that relators may sue on behalf of the government for violations of the FCA. As we explain more fully in the next section of this opinion, in no way does this upset the tripartite allocation of power upon which our government is based. Givler, 775 F.Supp. 172, 180-81.

B. Separation of Powers.

We next consider whether the qui tam provisions of the FCA violate the principle of separation of powers. The FCA's grant of authority to private parties to sue in the name of the United States for injuries to the federal treasury is certainly anomalous with respect to normal divisions of authority. But the question in this case is not whether the qui tam provisions fit neatly into usual public power distribution patterns; rather, the question is whether the Constitution prohibits use of this mechanism of civil law enforcement. To answer that question, we must determine whether Congress, under its policymaking authority, may place the prosecution of claims based on injuries to the government under the direction of qui tam relators.[7] In other words, we must decide whether the separation of powers principle inherent in the structure of the Constitution proscribes assignment of this essentially prosecutorial function to private parties.

1. General Principles.

The principle that the various powers of government must be separated and assigned to coordinate branches is fundamental to our form of government. The Framers, aware that concentration of power breeds tyranny, embedded the separation of powers principle into the Constitution in order to preserve liberty. The Supreme Court has repeatedly pronounced upon the importance of this

[7] In United States, ex rel. Marcus v. Hess, 317 U.S. 537, 542, 63 S.Ct. 379, 383, 87 L.Ed. 443 (1943), the Supreme Court held, referring to the FCA qui tam provisions, that "Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it. . . ." We do not believe this to be conclusive authority on the questions we address in this opinion for several reasons: the Court did not squarely face the constitutional issues presented in our case; the Court's jurisprudence regarding these issues has developed significantly since 1943; and Congress has substantially amended the FCA twice since the Hess decision.

principle in our constitutional scheme. See e.g., Mistretta, 488 U.S. at 380, 109 S.Ct. at 659 ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); Morrison v. Olson, 487 U.S. 654, 693, 108 S.Ct. 2597, 2620, 101 L.Ed.2d 569 (1988) ("Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches."); Freytag v. Commissioner of Internal Revenue, —— U.S. ——, 111 S.Ct. 2631, 2634, 115 L.Ed.2d 764 (1991); Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., —— U.S. ——, ——, 111 S.Ct. 2298, 2310, 115 L.Ed.2d 236 (1991).

The Supreme Court has also consistently recognized that "the Constitution by no means contemplates total separation" of the three branches of government. Buckley v. Valeo, 424 U.S. 1, 121, 96 S.Ct. 612, 683, 46 L.Ed.2d 659 (1976). Because the Court has acknowledged that a workable government requires a degree of interdependence and overlapping responsibility, the Court has "never held that the Constitution requires that the three branches of Government 'operate with absolute independence.'" Morrison, 487 U.S. at 694, 108 S.Ct. at 2620 (quoting United States v. Nixon, 418 U.S. 683, 707, 94 S.Ct. 3090, 3107, 41 L.Ed.2d 1039 (1974)). Nevertheless, the Court has "not hesitated to invalidate provisions of law which violate" the separation of powers principle. Id. 487 U.S. at 693, 108 S.Ct. at 2620; Buckley, 424 U.S. at 123, 96 S.Ct. at 684. We understand that, likewise, we must not hesitate to do so.

This case does not involve the type of separation of powers problem posed by one branch of government arro-

gating power at the expense of another. See Mistretta, 488 U.S. at 382, 109 S.Ct. at 660 ("It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.' ") (citation omitted); Morrison, 487 U.S. at 693, 108 S.Ct. at 2620; Freytag, —— U.S. at ——, 111 S.Ct. at 2638. Instead, this case requires us to determine the extent to which the legislative branch may, while remaining within constitutional boundaries, diminish the executive branch's authority without taking any of that authority as its own.

The Supreme Court has recognized that the separation of powers doctrine can be violated by "provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch." Mistretta, 488 U.S. at 382, 109 S.Ct. at 660 (emphasis added). It is the second type of violation that is at issue in this case. Although the Supreme Court has had occasion to address whether an act of Congress has triggered this type of violation, see Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 856-57, 106 S.Ct. 3245, 3259-60, 92 L.Ed.2d 675 (1986) (case raised no question of congressional aggrandizement but instead question whether Congress impermissibly undermined role of judicial branch); Morrison, 487 U.S. at 694, 108 S.Ct. at 2621 ("We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."), it has never considered a situation where Congress has sought to disperse some quantum of executive authority amongst the general public.

2. Applicable Tests.

The Supreme Court has established that where an act of Congress arguably threatens the integrity of another

branch's authority and independence, the proper separation of powers inquiry is whether Congress has "impermissibly undermined" the role of that branch. Schor, 478 U.S. at 856, 106 S.Ct. at 3260. This is the test which we apply to the qui tam provisions of the FCA. In other words, we must consider whether the qui tam provisions " 'disrupt [] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.' " Morrison, 487 U.S. at 695, 108 S.Ct. at 2621 (quoting Nixon v. Administrator of General Services, 433 U.S. 425, 443, 97 S.Ct. 2777, 2790, 53 L.Ed.2d 867 (1977)). To determine whether the qui tam provisions undermine the role of the Executive Branch, we must decide whether, within the meaning expressed in Morrison, these provisions accord the Executive Branch "sufficient control" over the conduct of relators to "ensure that the President is able to perform his constitutionally assigned duties." [8] Morrison, 487 U.S. at 696, 108 S.Ct. at 2622.

3. Comparison to Morrison v. Olson.

The authority most analogous to this case is Morrison v. Olson, in which the Supreme Court held that the independent counsel provisions of the Ethics in Government Act do not impermissibly interfere with the functions of the Executive Branch in violation of the separation of powers principle. 487 U.S. at 697, 108 S.Ct. at 2622. Morrison provides a baseline against which we may assess whether Congress has unconstitutionally diminished executive power by permitting private plaintiffs to sue in the name of the United States for an injury to the federal treasury. Comparison to Morrison is particularly useful because that case considers the degree to which Congress

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[8] For purposes of this case, the relevant presidential duty is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

may assign prosecutorial powers to persons not under the direct control of the Executive Branch.

Before comparing the qui tam provisions of the FCA to the independent counsel provisions of the Ethics in Government Act, we must address Boeing's contention that only the Executive Branch has the power to enforce laws, and therefore to prosecute violations of law.[9] It is clear to us that no such absolute rule exists. Morrison itself indicates otherwise because that decision validated the independent counsel provisions of the Ethics in Government Act even though it recognized that "[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." 487 U.S. at 695, 108 S.Ct. at 2621. The Court also stated in Morrison that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." 487 U.S. at 691, 108 S.Ct. at 2619 (emphasis added). Use of the word "typically" in that sentence, considered in light of the Court's ultimate conclusion upholding the independent counsel provisions, must mean that prosecutorial functions need not always be

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[9] To support this proposition, Boeing cites dicta from several cases, including Buckley, 424 U.S. at 138, 96 S.Ct. at 691 ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'"), and Springer v. Philippine Islands, 277 U.S. 189, 202, 48 S.Ct. 480, 482, 72 L.Ed. 845 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.") We note that the Court in those cases was concerned with congressional encroachment on executive powers, and did not have before it any question (such as that presented here) concerning the role of private parties in an enforcement scheme.

undertaken by Executive Branch officials. See Stephanie A.J. Dangel, Note, Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent, 99 Yale L.J. 1069, 1070 (1990) (Framers intended that prosecution would be undertaken by but not constitutionally assigned to executive officials, and that such officials would typically but not always prosecute). Thus, we reject Boeing's assertion that all prosecutorial power of any kind belongs to the Executive Branch.

Both sides in this litigation compare the degree of executive control over independent counsels to the degree of executive control over qui tam relators, yet they reach opposite conclusions. Boeing contends that Morrison stands at the outer limits of congressional authority to insulate government litigation from presidential control. Even accepting that proposition as true, however, we conclude that the FCA qui tam provisions do not exceed those limits. That is, the FCA permits a degree of executive control sufficient to satisfy the Morrison standard.

Each side in this case proposes a different approach to comparing the qui tam provisions to the independent counsel provisions. Boeing suggests that we should look at the precise means of executive control identified and found sufficient in Morrison, and then base our decision on the absence of those same means in the qui tam provisions. Kelly, on the other hand, suggests that we identify all possible means of executive control in the qui tam provisions, and then compare them in toto to the means of control identified in Morrison. We believe that under Morrison, Kelly's approach is the correct one. Twice in Morrison the Court stated that the proper inquiry is whether the Act "taken as a whole" violates the principle of separation of powers by unduly interfering with the President's constitutional role. 487 U.S. at 685, 693, 108 S.Ct. at 2615, 2620. Thus Morrison instructs us to compare the qui tam provisions "as a whole" to the independent counsel provisions "as a whole".

The powers of an independent counsel are quite broad. "With respect to all matters within the independent counsel's jurisdiction, the Act grants the counsel 'full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice.'" Morrison, 487 U.S. at 662, 108 S.Ct. at 2604, citing 28 U.S.C. § 594(a). The counsel's functions and powers include conducting grand jury proceedings and other investigations, initiating and conducting civil and criminal litigation, accepting referrals of matters from the Attorney General, framing and signing indictments, filing informations, appealing decisions, and handling all aspects of any case "in the name of the United States." 487 U.S. at 662, 108 S.Ct. at 2604. The counsel may also draw on public resources by appointing employees, and requesting and obtaining assistance from the Department of Justice. Id. In addition, "whenever a matter has been referred to an independent counsel under the Act, the Attorney General and the Justice Department are required to suspend all investigations and proceedings regarding the matter." Id. at 662-63, 108 S.Ct. at 2604, citing 28 U.S.C. § 597(a).

The powers of a qui tam relator vary depending on whether and when the government takes over the qui tam action. First, when a relator proceeds with a case in which the government has not intervened, the relator exercises the broadest possible authority the FCA permits. Such a relator has full power to conduct litigation of the particular case in the name of the United States, but only with the resources of a private plaintiff and subject to possible discovery limitations. Also, a relator who pursues a frivolous action can be ordered to pay the defendant's costs and attorneys' fees. On the other hand, when the government takes over a qui tam case from the outset, the FCA explicitly accords the government primary authority to conduct the case. Finally, when the govern-

ment intervenes late in the action, a fair interpretation of the statute is that the government has a similar degree of control over the litigation as if it had intervened at the start.[10] In comparison to any of these three situations, an independent counsel exercises broader investigative authority, prosecutorial discretion, and authority to use the resources of the U.S. government than does a qui tam relator.

Morrison identifies several means by which the Executive Branch can control an independent counsel's exercise of the powers outlined above. First, no independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request an appointment is unreviewable. Second, the Attorney General retains the power to remove an independent counsel, though only upon a showing of "good cause." The Act requires the Attorney General to submit a report to the Judiciary Committees of the House and the Senate and to a special court responsible for appointing independent counsels specifying the grounds for removal. Morrison, 487 U.S. at 663, 108 S.Ct. at 663 (citing 28 U.S.C. § 596(a)(2)). The Attorney General's removal authority is further limited by the Act's provision that an independent counsel can obtain judicial review of the Attorney General's removal action by filing

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[10] As mentioned in Part I.B. of this opinion, the parties dispute whether the government exercises the same degree of authority whether it intervenes at the outset or later. The statute is ambiguous on this point, but can, if necessary to preserve the constitutionality of the statute, be read to provide the government the same authority to dismiss or settle the suit regardless of when it intervenes. See Morrison, 487 U.S. at 682, 108 S.Ct. at 2614 (regarding interpretation of a provision not tested in practice, Court noted that "it is the duty of federal courts to construe a statute in order to save it from constitutional infirmities . . . and to that end we think a narrow construction is appropriate here."); Schor, 478 U.S. at 841, 106 S.Ct. at 3251 (courts must construe federal statutes so as "to avoid serious doubt of their constitutionality") (internal quotation omitted).

a civil suit. The Act authorizes the reviewing court to grant reinstatement or "other appropriate relief." Id. at 663-64, 108 S.Ct. at 2605 (citing 28 U.S.C. § 596(a)(3)).

Third, the independent counsel's "jurisdiction" is defined with reference to the facts submitted by the Attorney General upon requesting an appointment. However, it is the special court charged with appointing an independent counsel that actually defines the counsel's prosecutorial jurisdiction. Id. at 661, 108 S.Ct. at 2602 (citing 28 U.S.C. § 593(b)), 679.[11] Finally, the Act requires the counsel to abide by Department of Justice policies, unless it is not possible to do so. Morrison, 487 U.S. at 696, 108 S.Ct. at 2622. The Court concluded that these features give the Executive Branch "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." Id. (emphasis added). We note that the Court reached this conclusion despite the fact that the Attorney General's unreviewable discretion to request appointment of an independent counsel is the only unconditional means of executive control which the Ethics in Government Act provides.

Under the FCA, the Executive Branch can control a qui tam relator's exercise of prosecutorial powers in several ways. The government can intervene in a case and then take primary responsibility for prosecuting the action; it can seek judicial limitation of the relator's participation; it can move for dismissal of a case which it believes has no merit,[12] after notice to the relator and opportunity for a hearing; it can seek a judicial stay of the

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[11] The Court held in Morrison that Article III does not prohibit Congress from vesting the Judicial Branch with power to define an independent counsel's jurisdiction as an incident to its power to appoint an independent counsel. Id. at 678-79, 108 S.Ct. at 2612-13.

[12] At least one district court has interpreted the FCA to permit the government to move for dismissal of a qui tam action without

relator's discovery regardless of whether it intervenes; and it remains free to seek any alternate remedies available, including through any administrative proceeding. 31 U.S.C. § 3730(c).

Several of the control mechanisms built into the qui tam provisions are qualified. For example, the government may dismiss an action in which it has intervened only after an objecting relator has had an opportunity for a hearing,[13] and may settle with a defendant only after

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actually intervening in the case. Juliano v. Federal Asset Disposition Ass'n, 736 F.Supp. 348 (D.D.C.1990), aff'd, 959 F.2d 1101 (D.C.Cir.1992). After four months of investigating Juliano's claims, the government filed a notice that it declined to take over the action as to some defendants, and that it moved to dismiss the others. Id. at 349. The court stated that in order to avoid serious constitutional questions which unduly curtailing the Attorney General's prosecutorial discretion would raise, it would interpret the Act's provision that the "Government may dismiss the action notwithstanding the objections" of the relator to apply to actions in which the government has not already intervened. Id. at 351. As the court aptly pointed out, the Act nowhere prohibits such an interpretation. See id. Though the specific question addressed in Juliano is not directly before us, we believe that the court's interpretation of the FCA is entirely appropriate and provides an illustration of the meaningful control which the Executive Branch can exercise over qui tam actions.

[13] It is not clear whether in practice this notice and hearing requirement has amounted to much of a hurdle for the government. However, we note that Congress apparently intended that the provision authorizing relators to formally object to any motions to dismiss or proposed settlements between the government and defendant should not pose a significant burden for the government or courts. The Senate Judiciary Committee Report on the version ultimately passed of the 1986 amendments to the FCA stated: Any objections filed by the qui tam plaintiff may be accompanied by a petition for an evidentiary hearing on those objections. The Committee does not intend, however, that evidentiary hearings be granted as a matter of right. We recognize that an automatic right could provoke unnecessary litigation delays. Rather, evidentiary hearings should be granted when the qui tam relator shows a

a court has determined that the proposed settlement is "fair, adequate, and reasonable under all the circumstances." [14] 31 U.S.C. § 3730(c)(2)(A), (B). Furthermore, the government must show "good cause" in order to intervene in an action which has already commenced. Id. § 3730(c)(3). However, the only unqualified control built into the independent counsel provisions is that the Attorney General has unreviewable discretion to request appointment of a counsel, and therefore to initiate litigation by a counsel. Boeing argues that the power to initiate litigation is an important and exclusively executive function.[15] Clearly, the government has greater authority

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"substantial and particularized need" for a hearing. Such a showing could be made if the relator presents a colorable claim that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary and improper considerations. Senate Judiciary Committee, False Claims Amendments Act of 1986, S.Rep. No. 345, 99th Cong., 2d Sess. 26 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5291.

[14] Significant precedent exists for the requirement that a court approve the government's decision to terminate a case brought on behalf of the United States. For example, Federal Rule of Criminal Procedure 48(a) requires the government to obtain leave of court to terminate a prosecution by dismissing an indictment, information or complaint. In addition, the government may settle a criminal case by plea bargain only with court approval. And finally, a court may enter a consent judgment proposed by the government in an antitrust action only if it is in the public interest. See United States, ex rel. Truong v. Northrop Corp., 728 F.Supp. 615, 622 (C.D.Cal.1989); United States, ex rel. Stillwell v. Hughes Helicopters, Inc., 714 F.Supp. 1084, 1093 (C.D.Cal.1989).

[15] Boeing supports this proposition by citing to dicta in two cases, i.e., Heckler v. Chaney, 470 U.S. 821, 832, 105 S.Ct. 1649, 1656, 84 L.Ed.2d 714 (1985) ("the decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch."), and United States v. Nixon, 418 U.S. 683, 693, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974) (Court noted the argument of President's counsel that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"). We do not believe

to prevent the initiation of prosecution by an independent counsel than by a qui tam relator. But once prosecution has been initiated, the government has greater authority to limit the conduct of the prosecutor and ultimately end the litigation in a qui tam action than it does in an independent counsel's action.[16] We conclude that because the Executive Branch has power, albeit somewhat qualified, to end qui tam litigation, it is not significant that it can not prevent its start.

The Court in Morrison noted that even though the mechanisms just discussed give the Executive Branch sufficient control over an independent counsel, it "is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." Morrison, 487 U.S. 695, 108 S.Ct. at 2621. The Court specifically pointed out that the Act does not allow the Attorney General to appoint the individual of his or her choice, to determine the counsel's jurisdiction, or to remove a counsel at will. Id. at 695-96, 108 S.Ct. at 2621-2622. Likewise, we do not deny that the qui tam provisions of the FCA to some degree diminish Executive Branch control over the initiation and prosecution of a defined class of civil litigation. Nonetheless, we find that the Executive Branch exercises at least an equivalent amount of control over qui tam relators as it does over independent counsels.[17] Thus, the FCA gives the Attor-

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these comments amount to an absolute rule that only executive officers may initiate any type of litigation in the name of the United States.

[16] The Attorney General can do no more than suggest to a court that it terminate the office of an independent counsel. Morrison, 487 U.S. at 664, 108 S.Ct. at 2605. By comparison, the government "may dismiss" a qui tam action "notwithstanding the objections" of the relator, as long as the relator has received notice and an opportunity for a hearing. 31 U.S.C. § 3730(c)(2)(A).

[17] The "jurisdiction" of a relator seems necessarily limited by the terms of the False Claims Act and the facts of the particular

ney General sufficient means of controlling or supervising relators to satisfy separation of powers concerns.

In addition to considering whether the Ethics in Government Act taken as a whole violates the separation of powers principle, the Court in Morrison also specifically addressed whether the provision of the Act restricting the Attorney General's power to remove an independent counsel, taken by itself, impermissibly interferes with the President's exercise of his functions. 487 U.S. at 685, 108 S.Ct. at 2616. The Court held in Morrison that the "good cause" restriction on the Attorney General's power to remove an independent counsel does not violate separation of powers. Id. at 693, 108 S.Ct. at 2620. The essence of the Court's removal analysis in Morrison, based on its interpretation of prior removal jurisprudence, is an inquiry into whether Congress has impermissibly encroached on executive power by limiting presidential removal authority. Id. at 685-93, 108 S.Ct. at 2615-20. See also Bowsher v. Synar, 478 U.S. 714, 726, 106 S.Ct. 3181, 3187, 92 L.Ed.2d 583 (1986) ("Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws."). The Court found no such encroachment evident in the independent counsel provisions. Morrison, 487 U.S. at 691, 108 S.Ct. at 2619.

In light of the attention paid to the removal issue in Morrison, we have considered whether the lack of a provision permitting the government to "remove" a relator invalidates the qui tam provisions. Short of dismissing a qui tam action, the government can only seek limitation of a relator's participation in a case. 31 U.S.C. § 3730 (c)(2)(C). However, the concept of removal does not make sense in the qui tam context, in which there is no "office" from which to remove the relator and subse-

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case; thus the fact that the Attorney General plays a role in defining an independent counsel's jurisdiction but not a relator's does not set the two Acts apart.

quently fill with someone else. Cf. Morrison, 487 U.S. at 664, 108 S.Ct. at 2605 (discussing procedures for terminating the "office" of an independent counsel). In contrast to independent counsels, relators are not replaceable. Cf. id. at 662 n. 5, 108 S.Ct. at 2604 n. 5 (special court which appoints independent counsels authorized under 28 U.S.C. § 593(e) to fill vacancies due to death, resignation or removal of an independent counsel). The only practicable way to "remove" a relator is to end the qui tam litigation—and this the government has power to do. While the government's power to end qui tam litigation is qualified, so is the government's power to remove an independent counsel,[18] thus, these aspects of the two Acts are not meaningfully distinguishable for purposes of separation of powers analysis.

4. Judicial Encroachment.

We have discussed in the preceding the central separation of powers issue presented to us in this appeal—that is, whether Congress has impermissibly undermined the role of the Executive Branch by permitting private parties to exercise some measure of prosecutorial authority. We must also resolve a distinct, but in this case less difficult, separation of powers problem: whether the qui tam provisions disrupt the proper balance of power between the three branches by permitting the Judicial Branch to encroach on executive authority. We recognize the general rule that under Article III, courts may not exercise "executive or administrative duties of a non-

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[18] In holding that Congress's imposition of a "good cause" standard for removal does not unduly trammel on executive authority, the Court stated: Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President. Morrison, 487 U.S. at 691-92, 108 S.Ct. at 2619.

judicial nature." Buckley, 424 U.S. at 123, 96 S.Ct. at 684. The purpose of this rule is "to maintain the separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches." Morrison, 487 U.S. at 680-81, 108 S.Ct. at 2613.

Boeing argues that the FCA gives federal courts too much control over whether the government may intervene later in a qui tam action which it initially declined to take over, because the Act requires the government to demonstrate "good cause" to do so. Boeing asserts that the "good cause" hurdle significantly interferes with the government's prosecutorial authority. Boeing attempts to support that assertion by noting that the court denied the government's intervention request in one out of only two cases of which it is aware in which the government has sought late intervention.[19] Boeing further argues that the FCA impermissibly grants the judiciary approval authority over government decisions to dismiss qui tam suits.

We conclude that the judicial involvement which the FCA authorizes does not contravene the separation of powers principle. First, in the absence of any meaningful indication that these requirements pose significant barriers to the Executive Branch's exercise of its prosecutorial authority, we see no reason to construe them as such and thereby heighten constitutional concerns. See note 8. Second, as we noted earlier, ample precedent exists for judicial oversight of the government's decision to dismiss a qui tam action. See note 12.

Furthermore, the extent of judicial involvement in the qui tam scheme is no greater than the extent of judicial

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[19] Unfortunately, Boeing did not provide us with a name or citation for that one case; thus, we are unable to verify whether the court did in fact deny the government's request for intervention or to consider the court's reasoning.

involvement in implementation of the independent counsel provisions of the Ethics in Government Act. The Court in Morrison held that the Constitution permits Congress to vest power in a special federal court to decide whom to appoint to the office of independent counsel, as well as to define a counsel's jurisdiction and perform a variety of other functions which, though "essentially ministerial," do require the exercise of some judgment and discretion. Morrison, 487 U.S. at 676-81, 108 S.Ct. at 2611-14. The Court also held that the special court's power to terminate the office of independent counsel is not a significant judicial encroachment on executive authority, even though it is not a typically judicial power and "has few analogues among the court's more traditional powers." Id. at 682, 108 S.Ct. at 2614. The Court explicitly construed the termination provision narrowly "in order to save it from constitutional infirmities," though it acknowledged that "an adventurous special court" conceivably could use its termination power aggressively. Id.

In light of Morrison, we believe it is not dispositive that no direct analogue exists for judicial authority to determine whether the government has demonstrated good cause to take over a case prosecuted in the name of United States.[20] This power may affect the government's prosecutorial discretion to some degree, but it does not amount to the power to supervise the prosecutorial conduct of either the Attorney General or a relator. Cf. Morrison, 487 U.S. at 681, 108 S.Ct. at 2614 ("The Act simply does not give the [special court] the power to 'supervise' the independent counsel in the exercise of his or her investigative or prosecutorial authority.") By comparison, we note that Morrison ap-

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[20] Federal courts do, however, routinely make evaluations which are similar to the intervention determination under the FCA. See Federal Rule of Civil Procedure 24(b) (permissive intervention). Of course, Rule 24(b) determinations do not raise the Article III concerns we address here.

proved a scheme in which the Attorney General relinquishes all unqualified prosecutorial discretion with respect to a matter referred to an independent counsel once he or she has decided to request appointment of a counsel. Moreover, Morrison specifically held that the provision that the Attorney General must show "good cause" to remove an independent counsel and that the removal decision is subject to judicial review does not offend constitutional principles by permitting excessive judicial involvement. Id. at 691, 108 S.Ct. at 2619.

Considering the matter with a practical eye, cf. Schor, 478 U.S. at 851, 106 S.Ct. at 3257 ("[I]n reviewing Articles III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."), we conclude that the FCA does not authorize the judiciary to infringe on prosecutorial authority to a degree beyond the bounds establish in Morrison. The government's authority to intervene at the outset of an action is unfettered; we have seen no indication that it is difficult for the government to show good cause to intervene late; and, in view of analogous authority, judicial oversight of the government's dismissal power is unremarkable.

5. Conclusion.

Taken as a whole, and considering the removal issue in particular, the FCA affords the Executive Branch a degree of control over qui tam relators that is not distinguishable from the degree of control the Morrison Court found the Executive Branch exercises over independent counsels. Therefore, we conclude that the qui tam provisions of the FCA do not "impermissibly interfere" with the President's exercise of his constitutionally assigned duties. Nor do the provisions disrupt the "proper balance" between the branches, because, like the Ethics in Government Act, the FCA permits the Executive Branch

to retain "sufficient control" over prosecutorial functions.[21] Finally, the provisions do not authorize constitutionally impermissible judicial encroachment on executive power.

C. Appointments Clause.

The third constitutional question we consider is whether the qui tam provisions of the FCA violate the Appointments Clause.[22] This case does not present the usual situation raising an Appointments Clause problem—that is, where the power to appoint is placed in the hands of the wrong branch or governmental entity. In other words, this case does not present a question of improper diffusion or arrogation of appointment power. Rather, it requires us to inquire whether completely unappointed qui tam relators wield so much governmental power that they must be appointed in conformity with the Appointments Clause.

The purpose of the Appointments Clause is to limit congressional discretion to disperse the power to appoint, and thereby preserve the Constitution's structural integrity. Freytag, —— U.S. at ——-——, ——-——, 111 S. Ct. at 2638-39, 2641-42. Under Buckley, persons who are not appointed by a body with proper appointment

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[21] Boeing raises the specter of Congress enacting an unlimited series of qui tam provisions if this court finds the qui tam provisions in the FCA to be constitutional. However, this pure speculation about the policy choices Congress might attempt to make does not weigh into our constitutional analysis. Furthermore, it is unlikely that in other areas of civil law enforcement a similarly concrete, identifiable injury to the U.S. treasury as exists in the FCA context would exist as a basis for standing.

[22] Art. II, § 2, cl. 2 of the U.S. Constitution provides: "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

authority, and who therefore can not be considered "Officers of the United States," may not discharge functions that are properly discharged only by "officers". 424 U.S. at 140, 96 S.Ct. at 692. The test which Buckley provides to assess whether persons exercise authority which can only properly belong to appointed "officers" is whether those persons "exercis[e] significant authority pursuant to the laws of the United States." Id. at 126, 96 S.Ct. at 685. The Court held in Buckley that statutory provisions vesting in the Federal Election Commission "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" violate the Appointments Clause because only officers may perform such functions. Id. at 140, 96 S.Ct. at 692.

The appropriate questions in this case, therefore, are whether qui tam relators exercise "significant authority" under the FCA, and whether the FCA vests in relators "primary responsibility" for enforcing the Act by litigating in the federal courts. Our answers to these questions follow logically from our determination, explained in Section III.B., that the qui tam provisions do not violate the separation of powers principle. We have concluded that the Executive Branch retains "sufficient control" of relators such that their exercise of authority to sue on behalf of the United States does not "impermissibly undermine" executive functions. In keeping with that conclusion, we find it impossible to characterize the authority exercised by realtors as so "significant" that it must only be exercised by officers appointed in the manner which Article II, § 2, cl. 2 prescribes. See Buckley, 424 U.S. at 126, 96 S.Ct. at 685. Linking our Appointments Clause and separation of powers analyses in this manner is appropriate in light of the fact that the Supreme Court has interpreted the Appointments Clause to serve the purpose of maintaining the separation of powers in the constitutional scheme. Freytag, —— U.S. at ——, ——, 111 S.Ct. at 2638, 2641 ("The principle of separation of powers is embedded in the Appointments Clause."); See Buckley, 424 U.S. at 120, 124, 96 S.Ct. at 682, 684.

Boeing and amici supporting its position argue, citing Buckley, that only officers of the United States may litigate on behalf of the government. We do not believe Buckley can fairly be read to state an unequivocal rule that only officers may exercise any prosecutorial authority in the name of the United States. Instead, Buckley, properly construed, directs only that persons who have "primary responsibility" and "significant authority" to enforce a law through litigation must be considered officers. Buckley, 424 U.S. at 126, 140, 96 S.Ct. at 685, 692.

As Kelly correctly points out, the qui tam provisions do not contravene Buckley's rule. The fact that relators sue in the name of the government does not vest them with any governmental powers; they conduct litigation under the FCA with only the resources of private plaintiffs. Furthermore, relators have no greater authority to enforce the FCA than does the Attorney General, and under the terms of the statute must yield to the government's assumption of "primary responsibility" when it elects to intervene in a qui tam action. 31 U.S.C. § 3730(c)(1). When the government does not intervene, a relator retains primary responsibility for the litigation, thus presenting what may seem a close question under Buckley; but even in that situation, the relator's responsibility only extends to a single case, and the relator's activities can still be limited by the court upon the request of either the government or the defendant.[23] Thus, the qui tam scheme does not threaten the interest in preventing the exercise of unchecked or unbalanced government power which underlies the Appointments Clause. Moreover, the Court's central point in

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[23] In addition, as the district court below pointed out, a relator "is not appointed by Congress, receives no federal salary, and serves for no specified term." Order denying dismissal at 7. These factors distinguish relators from "officers". See Auffmordt v. Hedden, 137 U.S. 310, 327, 11 S.Ct. 103, 108, 34 L.Ed. 674 (1890) (person is not an "officer" within meaning of Appointments Clause where his "position is without tenure, duration, continuing emolument, or continuous duties").

Buckley was that Congress may not arrogate power to itself by appointing officers who perform executive functions. The Court held that the Federal Election Commission could not exercise the powers conferred upon it precisely because Congress exceeded its authority by vesting itself with power to appoint the commissioners. Buckley, 424 U.S. at 143, 96 S.Ct. at 693. Such concerns about congressional aggrandizement simply are not implicated in this case.

We conclude that a qui tam relator, who litigates only a single case, does not have "primary responsibility" within the meaning of Buckley for enforcing the FCA. Nor does a relator exercise authority so "significant" that the Constitution only permits an officer of the United States to exercise it. Therefore, the qui tam provisions do not violate the Appointments Clause.

D. Due Process.

The final question before us is whether the qui tam provisions of the FCA violate the Due Process Clause of the Fifth Amendment. Boeing argues that the FCA violates Boeing's right not to be deprived of property without due process,[24] because it permits financially interested relators to prosecute the company on behalf of the government. Boeing contends that the Act's promise of a reward to relators for successful prosecution creates a conflict of interest between a relator's desire for pecuniary gain and duty as a prosecutor performing "government functions" to seek a just and fair result. Because the government is the real party in interest, Boeing asserts, a relator must "place justice above competing objectives." Brief of Appellant at 10.

Boeing does not cite persuasive authority for its position. In one case on which Boeing relies, Marshall v.

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[24] The Fifth Amendment to the U.S. Constitution provides that no person shall be "deprived of life, or property, without due process of law." U.S. Const. amend. V.

Jerrico, 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980), the Supreme Court did state that a "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." Id. at 249-50, 100 S.Ct. at 1617. However, the Court found no due process violation in the case before it, in which the Court determined that prosecutors enforcing the child labor provisions of the Fair Labor Standards Act had only an exceptionally remote financial incentive for securing civil penalties. Id. at 250, 100 S.Ct. at 1617. Thus, the Court explicitly declined to state the "limits there may be on a financial or personal interest of one who performs a prosecutorial function." Id. In addition, the Court noted that "[p]rosecutors need not be entirely 'neutral and detached' . . . . In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests . . . are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties." Id. at 248-49, 100 S.Ct. at 1616. Boeing's contention that the Marshall Court "strongly suggested" that the Due Process Clause prohibits civil prosecutions by financially interested prosecutors is exaggerated, and does not support a finding of a due process violation here.

Also, Boeing's reliance on Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987), is misplaced. The Court held in Young that courts generally may appoint private attorneys to prosecute criminal contempt charges, but that the district court in the particular case before it erred in appointing attorneys who were counsel for an interested party in the underlying litigation. Id. at 793, 802, 107 S.Ct. at 2130, 2135. However, only Justice Blackmun in a concurring opinion stated that the error amounted to a due process violation. Id. at 815, 107 S.Ct. at 2141

(Blackmun, concurring). Young, in addition, is distinguishable from the present case in that it involved criminal prosecution, and therefore arguably required a higher level of prosecutorial disinterest than would be necessary in a civil enforcement action under the FCA. See id. at 808, 107 S.Ct. at 2138 (noting criminal nature of litigation in question).

Furthermore, the type of conflict of interest at issue in Young is simply not extent in the qui tam situation, where private and public goals are congruent. In Young, the Court observed that a private attorney appointed to prosecute a criminal contempt action "is appointed solely to pursue the public interest in vindictaion of the court's authority . . . [and] therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution." Id. at 804, 107 S.Ct. at 2136. But in the FCA context, Congress has created a scheme in which the interests of the private prosecutor (that is, the relator) coincide with the public interest in remedying harm to the federal treasury. Under the explicit terms of the Act, a qui tam action is taken on behalf of both the government and the relator, indicating that the two share a single interest in successful litigation. See 31 U.S.C. § 3730(b). Indeed, the only private interest at stake in a qui tam action is the interest which Congress has created in a reward for successful prosecution; thus the public's interest in successfully enforcing the FCA and the relator's private interest are intertwined rather than conflicting.

Moreover, contrary to Boeing's suggestion, it is not at all clear that qui tam relators are bound to fulfill the same type of public duty as government prosecutors. The statutory terms of the FCA do not impose such a duty nor do relators owe a duty by virtue of holding a public "office". Furthermore, the fact that relators sue in the name of the United States does not mean that they wield governmental powers and therefore owe the same type of duty to serve the public interest as government prosecutors. First, the fact that relators sue in the name of the

government is significant only with respect to their standing to sue; based on the terms of the statute, in no way does this fact otherwise affect the conduct of qui tam litigation. Second, unlike public prosecutors, relators do not have the "power to employ the full machinery of the state in scrutinizing any given individual." Young, 481 U.S. at 814, 107 S.Ct. at 2141; see id. at 811, 107 S.Ct. at 2140 ("terrible array of coercive methods" is available to prosecutors, including police investigation and interrogation, warrants, immunized informers and agents, authorized wiretapping, civil investigatory demands, and enhanced subpoena power.) Qui tam relators pursue their claims essentially as private plaintiffs, except that the government may displace a relator as the party with primary authority for prosecuting an action. Thus, qui tam litigation does not implicate due process concerns.

IV. CONCLUSION

We conclude that the qui tam provisions of the False Claims Act do not conflict with Article III of the Constitution, nor violate the principle of separation of powers, the Appointments Clause, or the Due Process Clause.[25] Accordingly, we affirm the district court's denial of Boeing's motion to dismiss.

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[25] The parties and amici devote considerable attention to arguments concerning the historical pedigree of qui tam actions. The two sides in this case present conflicting portraits of that pedigree. Obviously, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees." Marsh v. Chambers, 463 U.S. 783, 790, 103 S.Ct. 3330, 3335, 77 L.Ed.2d 1019 (1983). But historical factors can affect a court's decision where there is significant evidence of an "unambiguous and unbroken history" of practice dating from the framing of the Constitution. Id. at 790-92, 103 S.Ct. at 3335-36. The evidence presented by those urging affirmance in this case does not appear to rise to that level. In any event, because we find no constitutional violations here, we need not consider the historical arguments at all.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C89-1732R

UNITED STATES OF AMERICA, *ex rel.*, KEVIN G. KELLY,
Plaintiff,

v.

THE BOEING COMPANY, a Delaware Corporation,
Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

[Filed June 3, 1992]

THIS MATTER comes before the court on defendant's motion to dismiss. Having reviewed the motion together with all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

Plaintiff Kevin Kelly filed this *qui tam* action on behalf of the United States against defendant Boeing Company pursuant to the False Claims Act, 31 U.S.C. §§ 3729 *et seq*, to recover statutory penalties for fraud committed against the United States.[1] The False Claims Act provides

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[1] In 1986, defendant awarded a contract for construction and lease of work space for development of the Advanced Tactical Fighter and B-2 bomber to Sabey Corporation. Plaintiff was employed by defendant as a technical designer. Plaintiff alleges that various costs incurred by defendant in connection with the new

that any person who submits a fraudulent claim for payment to the government "is liable to the United States Government for a civil penalty [plus] three times the amount of damages which the Government sustains." 31 U.S.C. § 3729. The *qui tam* provisions of the False Claims Act authorize a private party to "bring a civil action for a violation of section 3720 for the person and for the United States Government." 31 U.S.C. § 3730 (b)(1).

Defendant moves to dismiss plaintiff's statutory claims, arguing that the *qui tam* provisions of the Act are unconstitutional. Plaintiff also has asserted a state law claim for wrongful discharge, which defendant argues is preempted by the statutory remedy provided under the False Claims Act, 31 U.S.C. § 3730(h).

II. DISCUSSION

A motion to dismiss pursuant to Fed. R. Civ. P. 12 (b)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *King v. California*, 784 F.2d 910, 912 (9th Cir. 1986), *cert. denied*, 484 U.S. 802 (1987).

A. *Constitutional Challenge to False Claims Act*

When reviewed for constitutional infirmities, congressional enactments are presumptively valid. *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980).

> " 'When [a federal court] is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a

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site were unreasonable, and that these unreasonable costs are being billed to the government as overhead.

> deeply vexing national problem, it should only do so for the most compelling constitutional reasons.' "

Mistretta v. United States, 488 U.S. 361, 384 (1989) *quoting Bowsher v. Synar,* 478 U.S. 714, 736 (1986) (Stevens, J., concurring).

Defendant asserts four bases for its constitutional challenge: (1) that the False Claims Act violates the separation of powers doctrine; (2) that Congress "appoints" the *qui tam* relator to prosecute the action without satisfying the requirements of the appointments clause of Article II; (3) that the relator lacks standing because he has not suffered an injury in fact; and (4) that prosecution of the matter by a private party with a financial interest in the case violates due process. The court will consider each challenge in turn.

1. *Separation of powers*

Under Article II, section 3, of the Constitution, the President "shall take care that the laws be faithfully executed." The executive's power to enforce the laws of the United States includes authority to investigate and litigate offenses against the United States. *Buckley v. Valeo,* 424 U.S. 1, 138-39 (1974). All suits brought by or on behalf of the United States, "so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney General." *Id.* at 139. However, the Supreme Court has upheld Congressional enactments that delegate the power, authority, and discretion to initiate a lawsuit on behalf of the United States. *See Morrison v. Olson,* 487 U.S. 654, 696-97 (1988) (upholding against separation of powers and appointments clause challenges the Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591-99). The constitutional test is whether the statute "impermissibly undermine[s] the powers of the executive," *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 856 (1986), or

"disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions. *Nixon v. Administrator of General Services,* 433 U.S. 425, 443 (1977).

Since the False Claims Act does not empower Congress in any way to control or supervise *qui tam* actions,[2] the court finds that the statute does not create a danger of congressional usurpation of executive functions. *See Morrison,* 487 U.S. at 694.

Next, the court must examine whether the Act works a "judicial usurpation of properly executive functions." *Morrison,* 487 U.S. at 695. Defendant argues that if the government elects not to proceed with the lawsuit, section 4740(c)(3) accords the relator full discretion to control the scope of the litigation, and the government is barred from intervening unless the court finds "good cause." [3] De-

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[2] The *qui tam* plaintiff must file his or her complaint in camera, not to be served on defendant until the court orders. 31 U.S.C. § 3730(b)(2). The government has a minimum of sixty days to investigate plaintiff's claims, 31 U.S.C. § 3730(b)(2), and is entitled to an extension of the investigatory period upon a showing of good cause. 31 U.S.C. 3730(b)(3). During the investigatory period, if the government concludes that the action is without merit, it may intervene and dismiss. *See* 31 U.S.C. § 3730(b)(4) and (c)(2)(A). At the end of the investigatory period, the government elects whether to intervene and pursue the action, or allow the case to go forward under the aegis of the *qui tam* plaintiff. 31 U.S.C. § 3730(b)(4).

If the government elects non-intervention, the Attorney General continues to receive copies of all pleadings and copies of deposition transcripts. *See* 31 U.S.C. § 3730(c)(3). The government may make an *in camera* motion to stay ongoing discovery where such discovery threatens to interfere with the government's prosecution of another case. The government may file amici briefs in the *qui tam* action. The government can intervene at upon a showing of good cause. 31 U.S.C. § 3730(c)(3).

[3] Section 3730(c)(3) provides: "If the Government elects not to proceed with the action, the person who initiated the action

fendant contends that the good cause requirement works a judicial usurpation of an executive function. Defendant does not argue that there is a genuine danger that the government will be denied the right to intervene, but rather that the good cause requirement is a usurpation of power in theory. The court finds that the good cause requirement is an extremely limited standard of review, which in practical terms will prove to be a small hurdle. *See United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1092 (C.D. Cal. 1989). The court is unpersuaded that the good cause requirement constitutes a judicial usurpation of executive power.

Finally, the court finds that the Act does not "'impermissibly undermine' the powers of the Executive Branch." *Morrison*, 487 U.S. at 654 (quoting *Schor*, 478 U.S. at 856). Defendant argues that the statute precludes the court from taking any action that would limit "the status and rights of the person initiating the action," *see* 31 U.S.C. § 3730(c)(3), and that this language bars the government from intervening and moving to dismiss the *qui tam* action. However, the court rejects defendant's interpretation of the phrase "without limiting the status and rights of the person initiating the action." After intervention, the relator retains the same status and rights as a litigator that he or she had before the government intervened. The relationship between the relator and the government after intervention is the same as if the government had elected to proceed in the first instance,

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shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

in which case the government is expressly authorized to move for dismissal. *See* 31 U.S.C. § 3730(c)(2)(A) (government may dismiss action notwithstanding objections of person initiating action if that person is notified of motion to dismiss and given opportunity for hearing).

Other courts that have confronted the separation of powers challenge to the False Claims Act have upheld the statute. *See United States ex rel. Newsham v. Lockheed*, 722 F. Supp. 607, 612 (N.D. Cal. 1989); *Stillwell*, 714 F. Supp. at 1091; *United States ex rel. Truong v. Northrop Corp.*, 728 F. Supp. 615, 621 C.D. Cal. 1989); *United States Dept. of HUD ex rel. Givler v. Smith*, 775 F. Supp. 172, 177 (E.D. Pa. 1991). This court joins the weight of authority, and rejects defendant's separation of powers challenge.

2. *Appointments clause*

Defendant argues that litigation on behalf of the government must be conducted by an officer of the United States appointed under the Appointments Clause of Article II, section 2, clause 2.[4] The Supreme Court has held that under the Appointments Clause, Congress cannot enact legislation empowering it to "enforce [the laws] or appoint the agents charged with the duty of such enforcement." *Buckley v. Valeo*, 424 U.S. 1, 139 (1976). The statute at issue in *Buckley*, the Federal Election Campaign Act, created a standing commission with authority to enforce federal election laws. The commission's mem-

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[4] The Appointments Clause, U.S. Const. art. II, section 2, cl. 2, provides in pertinent part that:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to . . . appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

bers were appointed by Congress, served for a specified tenure, and drew a federal salary. The *qui tam* provisions of the False Claims Act differ from the Federal Election Campaign Act in that the *qui tam* relator is not appointed by Congress, receives no federal salary, and serves for no specified term. The relator is only given authority to sue under the False Claims Act in his or her individual case. The *qui tam* relator is more appropriately classified as an agent than an officer for purposes of Appointments Clause analysis. *See Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (person whose position is without tenure, duration, continuing emolument, or continuous duties, and acts only temporarily is agent not officer).

Defendant's expansive reading of *Buckley* would implicitly invalidate all *qui tam* statutes. This court, like others before it, rejects such a reading of *Buckley*. *See, e.g., Truong*, 728 F. Supp. at 623; *Stillwell*, 714 F. Supp. at 1095.

3. *Standing*

The False Claims Act authorizes a private party to bring an action "for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). Defendant argues that the *qui tam* relator has not suffered any injury in fact, and challenges the statutory grant of standing to the relator.

Federal jurisdiction is limited to cases and controversies. U.S. Const. Art. III. In order to insure the requisite degree of adverseness, the plaintiff must establish that he or she has a personal stake in the litigation. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975). Plaintiff must show an actual or threatened injury that is fairly traceable to defendant's action, and that is likely to be redressed if the requested relief is granted. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). Congress may create a legal interest and confer standing to assert that interest. *See Trafficante v. Metro-*

politan Life Ins. Co., 409 U.S. 205, 208-09 (1972). However, Congress cannot lower the threshold requirements of standing under Article III. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 487-88 n. 24 (1982).

Every court that has faced a standing challenge to the *qui tam* provisions of the False Claims Act has upheld the statute. The Supreme Court has considered *qui tam* statutes, and has never questioned the standing of a *qui tam* relator. Federal district courts have applied several theories in upholding the *qui tam* provisions of the False Claims Act against standing challenge. In *United States ex rel. Truong v. Northrop Corp.*, the court declined to apply the injury-in-fact standard to the *qui tam* plaintiff where the presence of injury to the government is not disputed. *Truong*, 728 F. Supp. at 618-19 (if there is evidence of palpable injury to entity on whose behalf and in whose name suit is brought, it is superfluous to require that relator be individually aggrieved). In *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, the court held that the relator was entitled to sue under a statutory grant of standing for the injury to the United States. *Stillwell*, 714 F. Supp. at 1098. The requirement that the relator have a personal stake in the outcome of the litigation was satisfied by the statutory bounty provision. *Id.* In *United States Dept. of HUD ex rel. Givler v. Smith*, the court found that the purposes of modern standing doctrine were served by the *qui tam* provisions of the False Claims Act. *Givler*, 775 F. Supp. at 180. The court rejects defendant's standing challenge.

4. *Due process*

Defendant argues that because plaintiff is suing on behalf of the United States government and is not subject to the same rules and constraints as a public prosecutor, defendant will be deprived of its Fifth Amendment right to due process if the *qui tam* action proceeds. The court

is unimpressed with defendant's concern that somehow a private plaintiff will pursue unethical means in *qui tam* and thus deprive defendant of due process. The *qui tam* plaintiff's role is sufficiently different from that of a public prosecutor so as not to implicate due process. Since the relator pursues only one case, there is no question as to disparate treatment of potential defendants.

B. *Preemption challenge to wrongful discharge claim*

Plaintiff asserts a statutory claim for wrongful discharge under 31 U.S.C. § 3730(h) and a state law claim for wrongful discharge in violation of public policy. Section 3730(h) provides in pertinent part as follows:

> "Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole." 31 U.S.C. § 3730(h).

Defendant argues that the state law claim is preempted by the federal statutory claim. Plaintiff responds that a jury could find for him on his state law claim even if it finds against him on the § 3730(h) claim, and that the state law claim therefore is not preempted.

A cause of action for wrongful discharge in violation of public policy may or may not be preempted when the public policy is declared in a statute providing a remedy. *See Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn. 2d 46, 54, 821 P.2d 18 (1991). In determining whether the statute is the exclusive means of redress, the court considers "the comprehensiveness, or adequacy,

of the remedy provided" by the statute. *Wilmot*, 118 Wn. 2d at 61.

The statutory remedy under § 3730(h) provides a comprehensive remedy for retaliation by defendant. The court finds that plaintiff's state law wrongful discharge claim is preempted by the federal remedy, and will grant defendant's motion to dismiss with respect to this claim.

NOW, THEREFORE, it is ORDERED as follows:

(1) Defendant's motion to dismiss is GRANTED IN PART AND DENIED IN PART as follows:

(a) Defendant's motion to dismiss plaintiff's Washington State common law wrongful discharge claim is GRANTED;

(b) With respect to all other claims of plaintiff, defendant's motion to dismiss is DENIED.

DATED at Seattle, Washington this 3rd day of June, 1992.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
Chief United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C89-1732R

UNITED STATES OF AMERICA, ex rel. KEVIN G. KELLY,
Plaintiff,

v.

THE BOEING COMPANY, a Delaware corporation,
Defendant.

ORDER CERTIFYING INTERLOCUTORY APPEAL

[Filed June 17, 1992]

The Court, having considered the parties' Stipulated Request to Certify Immediate Appeal, Boeing's Motion for Certification, the Court's June 3, 1992 Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, and the records and files herein, finds and concludes as follows:

1. Boeing filed a motion to dismiss asserting four separate constitutional challenges to the *qui tam* provisions of the False Claims Act: separation of powers, Appointments Clause, due process and standing. The Court entered an order on June 3, 1992, rejecting defendant's constitutional challenges.

2. These four constitutional issues are controlling issues of law. A ruling in favor of defendant on any one of these issues is dispositive of the case and would result

in dismissal of plaintiff's *qui tam* claims which constitute the first cause of action.

3. There is substantial ground for difference of opinion concerning each of the four constitutional issues raised by defendant.

4. Immediate appeal of these constitutional issues may materially advance the ultimate termination of this litigation. A ruling in defendant's favor and consequent dismissal of plaintiff's first cause of action would substantially reduce the number and complexity of issues in this case.

5. Immediate appellate resolution of these constitutional issues would serve judicial economy beyond this case. Hundreds of *qui tam* cases have been filed since the 1986 amendments to the False Claims Act, many of them in the Ninth Circuit. An appellate level decision that the Act is unconstitutional would result in termination of many pending cases.

6. The United States District Court for the Central District of California recently certified an immediate appeal of the separation of powers, Appointments Clause and standing issues in *United States ex rel. Madden v. General Dynamics,* No. CV 88-05352 WMB (C.D. Cal.). The application to file an interlocutory appeal in *Madden* is still pending. *Madden,* however, does not raise the due process issue—an issue of first impression—raised in this case.

7. It would serve judicial economy for the Ninth Circuit to consider this case at the same time it considers *Madden* so that it can address the due process issue when it rules on the other constitutional challenges.

IT IS THEREFORE ORDERED, pursuant to 28 U.S.C. § 1292(b) and Fed. R. App. P. 5(a), that the Court's order of June 3, 1992, granting in part and denying in part defendant's motion to dismiss, is amended

by adding the following paragraph at the end of Section IIA:

> The Court is of the opinion that the four constitutional issues raised by defendant are controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation. Therefore, the Court certifies an interlocutory appeal of the constitutional issues as provided in 28 U.S.C. § 1292(b) and Fed. R. App. P. 5(a).

The clerk of the court is directed to forward uncertified copies of this order to counsel of record.

DATED this 17th day of June, 1992.

/s/ Barbara J. Rothstein
HONORABLE BARBARA J. ROTHSTEIN
United States District Judge

Presented by:

PERKINS COIE

By /s/ M. Margaret McKeown
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APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92-80189

DC# CV-89-1732-R
Western Washington
(Seattle)

UNITED STATES OF AMERICA, ex rel. KEVIN G. KELLY,
Plaintiff-Respondent,

vs.

THE BOEING COMPANY, A DELAWARE CORPORATION,
Defendant-Petitioner.

ORDER

New Case No.: 92-36660

[Filed Aug. 26, 1992]

Before: BRUNETTI and KLEINFELD, Circuit Judges

The petition for permission to appeal under 28 U.S.C. § 1292(b) is granted. *See In re: Cement Antitrust Litigation (MDL No. 296)*, 73 F.2d 1020 (9th Cir. 1982). Petitioner shall perfect its appeal pursuant to Fed. R. App. P. 5(b).

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE II OF THE UNITED STATES CONSTITUTION

Section 1. The executive Power shall be vested in a President of the United States of America.

* * * *

Section 2. [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * * *

Section 3. [The President] shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

ARTICLE III OF THE UNITED STATES CONSTITUTION

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

* * * *

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Con-

suls;—to all Cases of admirality and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; —between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

31 U.S.C. § 3729 (1988)

§ 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) KNOWING AND KNOWINGLY DEFINED.—For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information.

and no proof of specific intent to defraud is required.

(c) CLAIM DEFINED.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

31 U.S.C. § 3730 (1988 and Supp. III 1991)

§ 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of

harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Gov-

ernment has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report. hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10

percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice

the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in section [1] paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit,

[1] So in original.

or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

(2)

Supreme Court, U.S.
FILED
JAN 13 1994
OFFICE OF THE CLERK

No. 93–817

In the Supreme Court of the United States

OCTOBER TERM, 1993

THE BOEING COMPANY, PETITIONER,

v.

UNITED STATES OF AMERICA, EX REL. KEVIN G. KELLY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT BRIEF FOR THE RESPONDENT KEVIN G. KELLY AND AMICUS CURIAE UNITED STATES SENATE IN OPPOSITION TO THE PETITION FOR CERTIORARI

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JANUARY 1994

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the provisions of the False Claims Act that authorize a private person to bring a civil action to recover for the United States civil penalties and damages for false claims against the United States and to receive a portion of the recovery, subject to the Executive's powers under the Act to protect its interests in the action, comport with the separation of powers, the Appointments Clause, the standing requirement of Article III, and the Due Process Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

NO. 93–817

THE BOEING COMPANY, PETITIONER,

v.

UNITED STATES OF AMERICA, EX REL. KEVIN G. KELLY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT BRIEF FOR THE RESPONDENT KEVIN G. KELLY AND AMICUS CURIAE UNITED STATES SENATE IN OPPOSITION TO THE PETITION FOR CERTIORARI

Respondent, Kevin G. Kelly, the qui tam plaintiff-appellee below, and the United States Senate, as *amicus curiae,* submit this joint brief in opposition to the petition of The Boeing Company for a writ of certiorari. The interest of the Senate in this case is grounded in the conviction that the enlisting of private individuals through qui tam actions, as a supplement to public enforcement, is a vital and constitutional component of the effort to combat fraud against the federal government. [1]

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[1] The United States Senate participated as *amicus curiae* in the court of appeals, and appears here also in that capacity pursuant to 2 U.S.C. § 288e(a), which provides that the Senate may direct its Legal Counsel to appear as *amicus curiae* in its name "in any court of the United States * * * in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." Permissmen to appear is "of right" and may be denied only for untimeliness. 2 U.S.C. § 288*l*(a). *See* S. Res. 343, 102d Cong. (1992); 138 Cong. Rec. S13877 (daily ed. Sept. 17, 1992) (directing appearance in this case). The Senate's appearance is limited to the constitutional issue in this case.

STATEMENT OF THE CASE

Pursuant to the False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, ("FCA" or "the Act"), the respondent Kevin Kelly filed a qui tam action on behalf of himself and the United States against petitioner Boeing Company, alleging that petitioner had committed fraud against the United States by overcharging it for leasing costs for the buildings used in the petitioner's work on military aircraft programs. The petitioner moved to dismiss the complaint on a number of grounds, including that the qui tam provisions of the False Claims Act violate the Constitution. The district court denied the petitioner's motion to dismiss on constitutional grounds, Pet. App. at 74a–83a (unreported decision), certified an interlocutory appeal, *id.* at 84a–87a, and the court of appeals affirmed in an appeal under 28 U.S.C. § 1292(b).[2]

A. *The Statute*

First enacted in 1863,[3] the False Claims Act, *codified as amended at* 31 U.S.C. §§ 3729, *et seq.*, provides that any person who submits a fraudulent claim for payment to the United States is liable to the government "for a civil penalty * * * plus three times the amount of damages which the Government sustains." *Id.* § 3729(a). Although the Act has been amended several times, most comprehensively in 1986, since 1863 the Act has authorized both a civil action by the Attorney General,[4] and a qui tam action "by any person, as well for himself as for the United States."[5]

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[2] Although the petitioner has reproduced in its appendix both the original and amended opinions of the court of appeals, the amended opinion, which fully substituted for the original opinion, is the opinion of the Ninth Circuit in this case. That opinion, to be reported at 9 F.3d 743, is reproduced at Pet. App. at 1a–34a.

[3] Act of March 2, 1863, ch. 67, 12 Stat. 696.

[4] Act of March 2, 1863, ch. 67, § 5, 12 Stat. 698, *codified as amended at* 31 U.S.C. § 3730(a).

[5] *Id.* at § 4, 12 Stat. 698, *codified as amended at* 31 U.S.C. § 3730(b)(1).

The Act's system of dual public and private enforcement originally made no provision for the government's participation in qui tam actions, but in 1986 the Congress provided that the government may elect to take over a qui tam action. 31 U.S.C. § 3730(b)(2), (c)(3). To facilitate the government's decision, a relator must file the complaint under seal and serve it on the government, together with a written disclosure of all material evidence and information in the relator's possession. *Id.* § 3730(b)(2).

The Act provides the government with 60 days, or longer upon a showing of good cause, to investigate a qui tam relator's allegations and to determine whether to intervene. *Id.* § 3730(b)(2),(3). If the government elects to intervene "the action shall be conducted by the Government." *Id.* § 3730(b)(4)(A). If the government declines to take over the case, "the person bringing the action shall have the right to conduct the action." *Id.* § 3730(b)(4)(B). The court "may nevertheless permit the Government to intervene at a later date upon a showing of good cause." *Id.* § 3730(c)(3). To aid the government in this determination, the Act provides that the government may require the relator to serve it with copies of all pleadings and deposition transcripts. *Id.* The government is empowered to protect its interests in cases in which it does not participate by obtaining from the court a stay of a qui tam plaintiff's discovery, upon a showing that the discovery "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts." *Id.* § 3730(c)(4).

If the government takes over a qui tam action, "it shall have primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action." *Id.* § 3730(c)(1). Although the relator may continue as a party, the government may request that the court limit the participation of the relator if it "would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment." *Id.* § 3730(c)(2)(C). The govern-

ment may seek dismissal of the action, notwithstanding the objections of the relator, provided the relator has an opportunity for a hearing, *id.* § 3730(c)(2)(A), or settle with the defendant if the court determines after a hearing "that the proposed settlement is fair, adequate, and reasonable under all the circumstances." *Id.* § 3730(c)(2)(B).

The defendant, for cases in which the government elects to participate, may obtain judicial protection by requesting that the relator's participation be limited if it "would cause the defendant undue burden or unnecessary expense." *Id.* § 3730(c)(2)(D). In cases brought by qui tam relators in which the government does not intervene, a prevailing defendant may obtain an award of reasonable attorneys' fees and expenses upon a finding by the court "that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." *Id.* § 3730(d)(4).

Successful private litigants are entitled to a percentage of the government's recovery. *Id.* § 3730(d). In actions in which the government intervenes, relators are entitled to between 15% and 25% "depending upon the extent to which the person substantially contributed to the prosecution of the action," or a lesser amount if a court finds the action was primarily based on information available to the government. *Id.* § 3730(d)(1). In actions the government does not take over, the reward for the qui tam plaintiff is "an amount which the court decides is reasonable for collecting the civil penalty and damages," of not less than 25% nor more than 30% of the recovery for the government. *Id.* § 3730(d)(2). The Act also provides for the award of reasonable expenses and attorneys' fees to successful qui tam plaintiffs. *Id.*

B. *The Proceedings Below*

In November 1989, the respondent filed a qui tam complaint alleging that petitioner defrauded the United States in violation of the Act by charging it for unreasonable and unallowable leasing costs for facilities used by the petitioner in its work on military programs, including

the B–2 Bomber and Advanced Technical Fighter. Pet. App. at 2a. In accordance with the Act, respondent filed his complaint under seal and served it on the government. *Id.* at 2a. After investigating the allegations in the complaint, the government exercised its option under the Act to decline intervention. *Id.* The district court then unsealed the complaint, and the respondent served on the petitioner an amended complaint. *Id.* at 2a–3a.

The petitioner moved to dismiss the complaint on the grounds that the qui tam provisions of the False Claims Act violate (1) the separation of powers doctrine; (2) the Appointments Clause; (3) Article III standing doctrine; and (4) the Due Process Clause of the Fifth Amendment.[6] The district court rejected each of these arguments, noting that other lower courts that had confronted similar challenges to the Act had unanimously upheld its constitutionality. *Id.* at 79a, 80a, 81a.

The court of appeals affirmed. *Id.* at 34a. In a unanimous decision, the Ninth Circuit held that the qui tam provisions of the False Claims Act "do not exceed the limitations of Article III of the Constitution, nor do they violate the constitutional principle of separation of powers, the Appointments Clause of Article II, or the Due Process Clause of the Fifth Amendment." *Id.* at 2a. First, the court found that qui tam relators have Article III standing under *Lujan v. Defenders of Wildlife,* 112 S.Ct. 2130 (1992). Pet. App. at 7a–8a. It held that the False Claims Act "effectively assigns the government's claims to qui tam plaintiffs such as Kelly, who then may sue based upon an injury to the federal treasury. * * * Because the government clearly is capable of establishing injury-in-fact, causation, and redressability, qui tam plaintiffs satisfy these Article III requirements as well." Pet. App. at 8a. Also, qui tam suits involve allegations of fraud, which

[6] Pet. App. at 76a. The petitioner also moved to dismiss the respondent's state law claim for wrongful discharge on the ground that the False Claims Act's prohibition against retaliation, 31 U.S.C. § 3730(h), preempts state claims for wrongful discharge. The district court agreed and dismissed the state law claim. Pet. App. at 82a–83a.

are readily capable of judicial resolution. *Id.* at 28a n.19. By deciding qui tam actions courts "are not intruding into areas committed to the other branches of government." *Id.* at 11a.

With regard to the separation of powers, the court of appeals held that under this Court's decision upholding the independent counsel provisions of the Ethics in Government Act of 1978, the proper test is whether the qui tam provisions "accord the Executive Branch 'sufficient control' over the conduct of relators to 'ensure that the President is able to perform his constitutionally assigned duties.'" *Id.* at 14a (quoting *Morrison v. Olson,* 487 U.S. 654, 696 (1988)). Carefully examining the provisions of the False Claims Act, the court concluded that the Act leaves the Executive Branch "sufficient means of controlling or supervising relators to satisfy separation of powers concerns." Pet. App. at 23a.

Comparing the controls that the qui tam provisions afford the Executive Branch with the limited controls provided under the independent counsel law, the court found that "the Executive Branch exercises at least an equivalent amount of control over qui tam relators as it does over independent counsels." *Id.* It noted that, unlike the Attorney General's limited relationship to proceedings brought by an independent counsel, the government may intervene in a qui tam action and assume primary responsibility for prosecuting it, 31 U.S.C. § 3730(c)(1); it may move to dismiss a case which it believes lacks merit;[7] whether or not it intervenes it may seek a judicial stay of the relator's discovery, 31 U.S.C. § 3730(c)(4); and it is free to seek available alternative remedies through, for example, administrative proceedings.[8]

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[7] *Id.* § 3730(c)(2)(A). While a relator must be provided notice and an opportunity for a hearing, the court observed that this would not likely prove burdensome in practice, Pet. App. at 20a n.11, and that the analogous power of the Executive to remove an independent counsel was qualified by the requirement of good cause. *Id.* at 24a.

[8] *Id.* § 3730(c)(5); *see* Pet. App. at 20a. The court also rejected the petitioner's contention that the Act violates the separation of powers by

The court also held that the qui tam provisions of the False Claims Act do not violate the Appointments Clause. Observing that the proper test under this Court's decision in *Buckley v. Valeo,* 424 U.S. 1, 126 (1976)(per curiam), is whether relators exercise "significant authority" under the laws of the United States, the court stated that "we find it impossible to characterize the authority exercised by relators as so 'significant' that it must only be exercised by officers appointed in the manner which Article II, § 2, cl. 2 prescribes." Pet. App. at 29a. The court noted in addition that relators are also distinguished from officers because they receive no government resources or salary, and have no tenure. *Id.* at 30a & n.21

Finally, the court rejected petitioner's assertion that under the Due Process Clause financially interested litigants may not prosecute civil claims on behalf of the United States. Concluding that the petitioner's claim was unsupported by this Court's precedents, the court observed that suits by qui tam relators, who "pursue their claims essentially as private plaintiffs, except that the government may displace a relator as the party with primary authority for prosecuting an action," do "not implicate due process concerns." *Id.* at 73a.

REASONS WHY THE WRIT SHOULD BE DENIED

The petition should be denied because the court of appeals correctly applied this Court's precedents in upholding the constitutionality of the False Claims Act, it is the second court of appeals to uphold the Act's constitutional-

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permitting the judicial branch to determine whether the government may intervene in cases it initially declines and providing the judiciary a role in dismissals. Pet. App. at 25a–27a. The court determined that "[t]he government's ability to intervene at the outset of an action is unfettered; we have seen no indication that it is difficult for the government to show good cause to intervene late; and, in view of analogous authority, judicial oversight of the government's dismissal power is unremarkable." *Id.* at 27a.

ity[9] and there is no conflict with the decision of any other circuit, and there is no other reason why review by this Court is merited.

I.

THE COURT OF APPEALS' DETERMINATION THAT THE FALSE CLAIMS ACT IS CONSTITUTIONAL IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS

This Court is no stranger to the False Claims Act, or to qui tam actions, which "have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government." *Marvin v. Trout,* 199 U.S. 212, 225 (1905).[10] Fifty years ago, in denying an effort by the government to limit the scope of qui tam actions under the False Claims Act, this Court stated with great clarity that "Congress has the power to choose this method to protect the government from burdens fraudulently imposed upon it." *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 542 (1943). To the government's assertion in that case that control of false claims litigation should "be left to the Attorney General; that divided control is against the public interest," *id.* at 547, this Court responded that "[t]he government presses upon us strong arguments of policy against the statutory plan, but the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than at what it did."[11] At this late date in the his-

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[9] *United States ex rel. Kreindler & Kreindler v. United Technologies Corporation,* 985 F.2d 1148 (2d Cir.), *cert. denied,* 113 S.Ct. 2962 (1993) (holding that qui tam relators have standing).

[10] Qui tam actions, which had been an established part of English legal tradition, *see* 4 William S. Holdsworth, *A History of English Law* 356 (2d ed. 1937), were "routinely authorized by the First and subsequent early Congresses." Evan Caminker, *The Constitutionality of Qui Tam Actions,* 99 Yale L.J. 341, 342 & n.3 (1989) (listing qui tam statutes of the early Congresses).

[11] *Id.* at 546-47. Although the petitioner asserts that this Court "has noted the anomalous position of the qui tam lawsuit," Pet. Br. at 5, the Court has never expressed constitutional doubt about the Act.

tory of qui tam legislation, petitioner seeks to transform those rejected policy arguments into constitutional claims, and that effort should be equally unavailing.

A. *The False Claims Act Comports With the Separation of Powers*

1. THE DECISION OF THE COURT OF APPEALS IS CORRECT UNDER *MORRISON V. OLSON*

The court of appeals correctly concluded that the False Claims Act does not violate the separation of powers doctrine by unduly interfering with the role of the Executive Branch. Recognizing that *Morrison v. Olson,* 487 U.S. 654 (1988), is the "authority most analogous to this case" because it addressed "the degree to which Congress may assign prosecutorial powers to persons not under the direct control of the Executive Branch," Pet. App. at 15a, the court properly determined that the False Claims Act is at least as protective of the Executive's prerogatives as the independent counsel law upheld in *Morrison.*

"Taken as a whole," the court of appeals concluded, the False Claims Act gives the Executive Branch "a degree of control over qui tam relators that is not distinguishable from the degree of control * * * the Executive Branch exercises over independent counsels." Pet. App. at 27a. Under the independent counsel law at issue in *Morrison,* the Attorney General was required to seek the appointment of an independent counsel in specified circumstances, had no authority to supervise or control the counsel, lost all investigative and prosecutorial power within the counsel's area of jurisdiction, could not remove the counsel in the absence of "good cause" (which was subject to judicial review), and could terminate a counsel's investigation only on the ground that the investigation was completed or substantially completed. 28 U.S.C. §§ 592, 594, 596–97 (1988).

Moreover, "constitutional principles of separated powers are not violated . . . by mere anomaly or innovation." *Mistretta* v. *United States,* 488 U.S. 361, 385 (1989).

In contrast, under the False Claims Act the Executive retains full authority to investigate and prosecute violations, 31 U.S.C. § 3730(a), and retains significant control over actions initiated by private persons. It may assume "primary responsibility for prosecuting the action" (either at the outset or later for good cause), *id.* § 3730(c)(1), it may seek to dismiss or settle the suit, *id.* § 3730(c)(2)(A),(B), and qui tam relators may not voluntarily dismiss a case without the Executive's consent. *Id.* § 3730(b)(1). The Executive may seek to limit the relator's role where "unrestricted participation * * * would interfere with or unduly delay the Government's prosecution of the case." *Id.* § 3730(c)(2)(C). Whether or not it takes over the case, the Executive may seek to block "discovery by the person initiating the action [that] would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts." *Id.* § 3730(c)(4).

The petitioner has made, and on the record in this case can make, no showing of interferences with the Executive's law enforcement powers. Indeed, the only evidence is to the contrary. The government was permitted to investigate this case for three years before deciding not to intervene, evidently satisfying the district court that it had good cause to extend the investigation beyond 60 days. The government's election neither to participate in this case, nor to seek its dismissal or settlement, is consistent with its willingness in other cases "to allow the relator to go forward and attempt to make his case" [12]

The petitioner's contention that the Act fails adequately to preserve Executive control because it lacks some specific features of the independent counsel statute, Pet. Br. at 18–19, ignores this Court's instruction in *Morrison* that a statute must be evaluated as "a whole," 487 U.S at 685, 693, and overstates the significance of the dif-

[12] *False Claims Act Implementation: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 101st Cong., 2d Sess. 26 (1990) [hereinafter "1990 Hearing"] (statement of Ass't Att'y Gen. Stuart Gerson).

ferences between the statutes. While the government cannot control the initiation of a qui tam suit, once an action has begun "the government has greater authority to limit the conduct of the prosecutor and ultimately *end* the litigation in a qui tam action than it does in an independent counsel's action."[13]

Under the False Claims Act the government "'may dismiss' a qui tam action 'notwithstanding the objections' of the relator, as long as the relator has received notice and an opportunity for a hearing." Pet. App. at 22a n.14. In contrast, under the independent counsel law, the Executive has no authority to terminate a particular investigation it believes lacks merit, although it may move to terminate the office where an investigation is completed or substantially completed. 28 U.S.C. § 596(b)(2). The Executive's ability to remove an independent counsel is restricted to "good cause" and subject to judicial review. *Id.* § 596(a). Moreover, while "removal" of a qui tam litigant by dismissal of the complaint ends the litigation, removal of a particular independent counsel does not, as a removed independent counsel would simply be replaced. *Id.* § 593(e).

2. THE CONGRESS'S OBJECTIVE OF SUPPLEMENTING GOVERNMENT EFFORTS TO COMBAT FRAUD WITH PRIVATE ENFORCEMENT IS PERMISSIBLE UNDER THE SEPARATION OF POWERS

Petitioner argues that Congress had an "impermissible motive" for strengthening qui tam enforcement in 1986, namely that Congress did "not fully approve" of the manner of Executive enforcement. Pet. Br. at 18. Despite the 130-year history of the False Claims Act, petitioner con-

[13] Pet. App. at 22a (emphasis in original). The petitioner's observation that the relator cannot be "removed" if the government takes over the case, Pet. Br. at 19, ignores that the government can prevent any participation by the relator by filing suit first and can seek to limit the participation of the relator to the extent it "would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment." 31 U.S.C. § 3730(c)(2)(C).

tends that it finds "no valid reason for diminishing the President's constitutional authority." *Id.* However, this Court has repeatedly stressed that "[o]nly where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon v. Administrator of General Services,* 433 U.S. 425, 443 (1977).[14] While the Act's careful accommodation of the interests of the Executive makes this inquiry unnecessary, the Act's long history reflects Congress's ample justification for employing the qui tam mechanism for redressing fraud against the government.

The Act was first enacted as part of a comprehensive legislative effort to "stop[ ] the massive frauds perpetrated by large contractors during the Civil War." *United States v. Bornstein,* 423 U.S. 303, 309 (1976). A congressional committee formed to investigate "the gross waste and squandering of the public funds," H.R. Rep. No. 49, 37th Cong., 3d Sess. 5 (1863), "discovered an astounding amount of illegal and fraudulent activities. . . . Through haste, carelessness, or criminal collusion, the state and federal officers accepted almost every offer and paid almost any price for the commodities, regardless of character, quality, or quantity. . . ."[15] As the sponsor of the Act explained, the purpose of the qui tam provisions was to remedy this by "hold[ing] out to a confederate a strong temptation to betray his coconspirator, and bring him to justice. . . . I have based the [provisions] upon the old-fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice." Cong. Globe, 37th Cong., 3d Sess. 955-56 (1863) (remarks of Sen. Howard).

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[14] *See also Mistretta v. United States,* 488 U.S. at 383 n.13 (quoting *Nixon,* 433 U.S. at 443).

[15] 1 Fred Albert Shannon, *The Organization and Administration of the Union Army, 1861–1865,* at 58, 55–56 (1965) (quoting Tomes, *Fortunes of War,* 29 Harper's Monthly Mag. 228 (1864)).

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When Congress revisited the Act in 1986, it recognized that the False Claims Act had failed to stem a rising tide of fraud in government programs and procurements.[16] Exploring the reasons for this, the Senate Committee on the Judiciary learned that "'most fraud goes undetected,'"[17] because "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity." S. Rep. No. 99-345, at 4, 1986 U.S.C.C.A.N. 5269. The committee also found that individuals with information were unlikely to come forward because they tended to believe nothing would change even if they took the risk of reporting illegal activity, and because they feared reprisal.[18]

In addition to these problems, the committee found that "perhaps the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies," which requires them "to make 'screening' decisions." S. Rep. No. 99–345, at 7, 1986 U.S.C.C.A.N. 5272. "Allegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient. And with current budgetary constraints, it is unlikely that the Government's corps of individuals assigned to anti-fraud enforcement will substantially increase." *Id.*

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[16] S. Rep. No. 345, 99th Cong., 2d Sess. 2-3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267-68 (stating that based on Department of Justice estimates that fraud may be "draining 1 to 10 percent of the entire Federal budget," with a "spending level in 1985 of nearly $1 trillion, fraud against the Government could be costing taxpayers anywhere from $10 to $100 billion annually").

[17] *Id.* at 2, 1986 U.S.C.C.A.N. 5267 (quoting GAO Report to Congress, Fraud in Government Programs: How Extensive is it? How Can it be Controlled? (1981) and omitting footnote).

[18] *Id.* at 4, 5, 1986 U.S.C.C.A.N. 5269, 5270; *False Claims Reform Act: Hearing on S. 1562 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 82-83 (1985) [hereinafter "1985 Hearing"] (testimony of Robert Wityczak); *id.* at 51 (testimony of John Gravitt).

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The committee concluded that "[i]n the face of sophisticated and widespread fraud, . . . only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds," *id.* at 2, 1986 U.S.C.C.A.N. 5267, and that the False Claims Act, "rooted in the realization that we cannot guard against Government fraud without the aid of private citizen informers," had the potential to be a powerful tool in deterring fraud.[19] Thus, far from reflecting simple distrust of the Executive, as the petitioner contends, Pet. Br. at 18, the Act is a carefully considered response to the problems of detecting and remedying fraud against the government.

B. *The Qui Tam Provisions Do Not Implicate the Appointments Clause*

The court of appeals also correctly applied *Buckley v. Valeo,* 427 U.S. at 126, 140, to hold that qui tam relators need not be officers of the United States appointed in accordance with the Appointments Clause because they do not exercise "significant authority" and "primary responsibility" for conducting litigation. Pet. App. at 30a. Qui tam relators litigate false claims cases in the same manner as any other private litigant, and are subject to control by the government, which may either intervene or request that a court limit the relator's activities.

Petitioner concedes that the limited role of qui tam relators in a single case distinguishes them from the federal election commissioners in *Buckley,* but asserts that these factors do not distinguish relators from the independent counsel, who was held to be an officer of the United States in *Morrison v. Olson.* Pet. Br. at 16. However, as the court of appeals demonstrated, qui tam relators are distinguished from the independent counsel in several respects that make apparent why qui tam relators need not be appointed.

Although an independent counsel has primary responsibility for the conduct of a particular criminal case, without any possibility of Executive participation, a qui tam

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[19] *1985 Hearing, supra* n.18, at 2.

relator is subject to control by the government at any point the government intervenes. In addition, even when the government declines to intervene, it may seek limits on the relator's discovery. Moreover, qui tam relators, unlike the independent counsel, cannot be said to fill an office of the United States.[20] In contrast to the independent counsel, a relator does not hold a position in which he or she can be replaced, receives no salary, and is provided no resources by the government. Indeed, the Act specifically provides that "[t]he Government is not liable for expenses which a person incurs in bringing an action under this section."[21]

Finally, as the court below recognized, Pet. App. at 31a, the central point of *Buckley,* that Congress may not arrogate power to itself by appointing officers who perform executive functions, as it had with the federal election commissioners, is not implicated here.[22] No concerns about congressional aggrandizement are presented by the False Claims Act, as Congress has not retained for itself any control over the conduct of qui tam litigation.

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[20] *See Buckley,* 424 at 125–26 ("We think that the term 'Officers of the United States' as used in Art. II, [is] defined to include 'all persons who can be said to hold an office under the government.'") (Citation omitted).

[21] 31 U.S.C. § 3730(f). Compare 28 U.S.C. § 594(b) (providing for compensation of independent counsel); *id.* § 594(c) (authorizing independent counsel to appoint and fix the compensation of staff); *id.* § 594(d)(1) (authorizing independent counsel to use resources and personnel of the Department of Justice).

[22] 424 U.S. at 143. *See also Seattle Master Builders v. Pacific Northwest Electric Power and Conservation Planning Council,* 786 F.2d 1359, 1364-65 (9th Cir. 1986), *cert. denied,* 479 U.S. 1059 (1987). Nor, as the court of appeals correctly observed, Pet. App. at 28a, does this case present the question, addressed by this Court in *Freytag v. Commissioner of Internal Revenue,* 111 S.Ct. 2631, 2645 (1991), of whether the power to appoint has been diffused by placing it in the hands of appointers not enumerated in the Appointments Clause.

C. *False Claims Act Qui Tam Relators Have Article III Standing*

The court of appeals also correctly held that qui tam relators have Article III standing. A relator under the False Claims Act "effectively stands in the shoes of the government" and asserts on behalf of the United States a concrete claim for monetary damage from fraud, in return for which the relator receives a share of the recovery.[23] The petitioner concedes that "[n]o one doubts that the United States has standing to sue for violations of the False Claims Act." Pet. Br. at 13. The relator is, as this Court has recognized, given "a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff." *Lujan v. Defenders of Wildlife,* 112 S.Ct. at 2143 (distinguishing qui tam suits from suits in which an individual has no concrete private interest).

That the recognition of standing for qui tam relators is consistent with this Court's standing doctrine is evident when the policies underlying standing are considered in the context of the False Claims Act. This Court has observed that the "single basic idea" upon which the law of Article III rests is separation of powers. *Allen v. Wright,* 468 U.S. 737, 752 (1984). The requirement of standing serves to limit federal courts to their appropriate role in two ways: first, by requiring that courts consider only questions "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process;" and, second, by assuring that courts "not intrude into areas committed to the other branches of government." *Flast v. Cohen,* 392 U.S. 83, 95 (1968).

Qui tam actions under the False Claims Act respect those dual limitations. First, "[t]hey involve allegations of fraud—an area of law that is neither novel nor extraor-

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[23] Pet. App. at 8a. *See also United States ex rel. Kreindler & Kreindler v. United Technologies Corporation,* 985 F.2d at 1153-55; *accord United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center,* 961 F.2d 46, 49 (4th Cir. 1992) (stating that in a qui tam action standing depends upon the injury to the government).

dinarily complex." Pet. App. at 11a. By seeking the imposition of penalties for fraud against the federal treasury, qui tam relators do not ask a court to resolve "'ill-defined controversies over constitutional issues,' or a case which is of a 'hypothetical or abstract character.'" *Flast v. Cohen,* 392 U.S. at 100 (citations omitted).

Second, qui tam actions under the False Claims Act do not involve the judiciary in political confrontations with the representative branches. "Instead, they are merely accommodating a congressional policy decision that relators may sue on behalf of the government for violations of the [False Claims Act]." Pet. App. at 11a. *See also Priebe & Sons v. United States,* 332 U.S. 407, 417, 418 (1947) (Frankfurter, J., dissenting) (In "qui tam actions * * * society makes individuals the representatives of the public for the purpose of enforcing a policy explicitly formulated by legislation.").

The petitioner addresses alternative standing theories it labels "workplace injury" and "legislated standing" that were no part of the decision below. *See* Pet. Br. at 11–13. Moreover, with respect to "workplace injury" standing, or standing based on the injury a relator suffers from working for an employer engaged in fraud, that theory has been sketched for the most part only as an alternative basis for standing by four district courts, two of which were in the Ninth Circuit and are now controlled by the decision below. That a few district courts have rendered decisions that have included an argument in support of the result reached by the court below, provides scant reason for review by this Court.

With respect to "legislated standing," which the petitioner defines as standing based on Congress's providing a qui tam relator with a statutory share of any recovery, no court has held that the existence of a bounty alone is a basis for standing. Rather, several courts have noted that a statutory bounty provides the relator a concrete stake in the controversy, which is consistent with this Court's opinion in *Lujan v. Defenders of Wildlife,* 112 S.Ct. at 2143. Those courts have also recognized that

such a stake, while necessary, is not sufficient for standing. Court's that have focused on the relator's monetary stake have recognized that an injury must also exist and have identified the monetary injury to the government from fraud as the relevant injury.[24]

The petitioner argues that a qui tam plaintiff cannot sue based on an injury to the government because no statutory language suggests that Congress was attempting to assign a claim to relators. Pet. Br. at 14. However, as the court of appeals held in rejecting that contention, no terms of art are required to assign a claim. Pet. App. at 9a. The Act expressly gives the relator a right to bring suit on the government's behalf and "the entire purpose of the [False Claims Act] qui tam provisions is to employ the help of individuals to uncover fraud against the government."[25]

D. *Qui Tam Suits Under the False Claims Act Do Not Violate the Due Process Clause*

Finally, the assertion that the False Claims Act violates the Due Process Clause of the Fifth Amendment was properly rejected by the court of appeals. In *Marvin v. Trout,* 199 U.S. 212 (1905), this Court rejected a claim that a state qui tam action violated the Due Process Clause of the Fourteenth Amendment by providing a forfeiture "for the private benefit of a third person . . . who suffered no personal loss." *Id.* at 218. The Court stated that "[w]e are aware of no provision in the Federal Con-

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[24] *See, e.g., United States ex rel. Truong v. Northrop Corporation,* 728 F. Supp. 615, 618-19 & n.7 (C.D. Cal. 1989) (stating that Article III concerns are met because of the "very clear demonstration of injury to the government and . . . relator's personal stake in the litigation").

[25] *Id.* at 9a–10a. The petitioner's assertion that upholding standing would create a "loophole allowing Congress to create standing without regard to the limitations imposed by Article III," Pet. Br. at 14, was answered by the court of appeals, which stated that "pure speculation about the policy choices Congress might attempt to make does not weigh into our constitutional analysis. Furthermore, it is unlikely that in other areas of civil law enforcement a similarly concrete, identifiable injury to the U.S. treasury as exists in the [False Claims Act] context would exist as a basis for standing." Pet. App. at 28a n.19.

stitution which prevents this kind of legislation." *Id.* at 225. Likewise, no provision of the Constitution is violated by providing a litigant a financial interest in a civil action to vindicate the public interest in redressing fraud against the United States.

The authority relied upon by the petitioner for its due process claim, which addresses the requirements for criminal prosecutions and for public officials, neither of which are at issue here, was appropriately rejected by the court below as inapposite. Pet. App. at 32a. In *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), which held that a district court, appointing a private attorney to represent the United States in a criminal contempt prosecution, must select an attorney who is disinterested in the outcome of the prosecution, this Court explicitly grounded its holding on its supervisory powers over inferior courts and not on the Due Process Clause.[26] Moreover, as the court below observed, Pet. App. at 34a, *Young* was a criminal case where the concern about disinterested prosecutors is justified because the public prosecutor has at his command "a terrible array of coercive methods to obtain information," which, when misused, "would unfairly harass citizens, give unfair advantage to [the prosecutor's personal interests], and impair public willingness to accept the legitimate use of those powers."[27] These attributes of public power are unavailable to litigants who have only the litigation tools available to any private litigant in any civil litigation.[28]

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[26] *Young*, 481 U.S. at 809 & n.21.

[27] *Young*, 481 U.S. at 811 (quoting C. Wolfram, *Modern Legal Ethics* 460 (1986)). This Court has recently affirmed that "proceedings and penalties under the civil False Claims Act are indeed civil in nature" for the purpose of defining defendants' entitlement to general procedural safeguards. *United States v. Halper*, 490 U.S. 435, 442 (1989).

[28] Qui tam relators also clearly do not have the responsibilities of a neutral judge, and thus are not subject to the "rigid requirements * * *, designed for officials performing judicial or quasi-judicial functions, [which] are not applicable to those acting in a prosecutorial

Continued

In *Marshall v. Jerrico, Inc.*, also cited by the petitioner, this Court found no due process violation caused by a public official assessing penalties for violations of federal labor laws where his office received a portion of the proceeds. *See* Pet. App. at 32a. With respect to due process, qui tam relators are in an even stronger position than such a public official as "[i]t is not at all clear that qui tam relators are bound to fulfill the same type of public duty as government prosecutors * * *. [T]he fact that relators sue in the name of the United States does not mean that they wield governmental powers * * *." *Id.* at 33a. A qui tam relator litigates just like any other private litigant except that the government receives the bulk of the recovery and may elect to assume responsibility for the case.

The law is replete with examples of private civil litigants who have a financial stake in litigation in which they assert both their private interests and, as private attorneys general, the public's interest in "a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (per curiam); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 30–31 (D.C. Cir.) ("Enforcement by private attorneys general has become a feature of many modern legislative programs * * *. Indeed, such individuals and groups may assert the public interest even when their own interests do not precisely coincide."), *cert. denied*, 498 U.S. 980 (1990)). Just as in those cases in which litigants may function as private attorneys general, there is no conflict here between public and private interests, for "the only private interest at stake in a qui tam action is the interest which Congress has created in a reward for successful prosecution; thus the public's interest in successfully enforcing the [False Claims Act] and the relator's private interest are intertwined rather than conflicting." Pet. App. at 33a.

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or plaintiff-like capacity." *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980).

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS

The unanimity of the federal appellate and district courts in upholding the constitutionality of the qui tam provisions of the False Claims Act is further reason why review by this Court is not warranted. The Ninth Circuit is the second court of appeals expressly to address and reject a constitutional challenge, implicating both separation of powers and standing, to the qui tam provisions of the False Claims Act.[29] The Second Circuit, in *United States ex rel. Kreindler & Kreindler v. United Technologies Corporation*, 985 F.2d 1148, held that the grant of standing to qui tam relators comports with Article III. *Id.* at 1153–55. The court found that the injury requirement is satisfied because the government has suffered an injury, *id.*, at 1154, and a qui tam relator "stands in the shoes of the government, which is the real party in interest."[30] Relying in part on this Court's decision in *Lujan v. Defenders of Wildlife*, 112 S.Ct. at 2143, the Second Circuit concluded that the relator is provided with a concrete stake in the controversy by the "cash bounty" offered to the victorious relator. 985 F.2d at 1155.

The Second Circuit's evaluation of the separation of powers concerns underlying standing doctrine is also con-

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[29] In the Ninth Circuit, the panel which decided the case that is the subject of the present petition, relied upon its ruling below to reject a nearly identical constitutional challenge by another contractor. *United States ex rel. Madden v. General Dynamics Corporation*, 4 F.3d 827, 830 (9th Cir. 1993) (referring to the decision below for explanation of its reasons). The petitioner indicated in its brief, Pet. Br. at 3 n.1, that it understood that a petition for a writ of certiorari would be filed in that case, which was decided on September 14, 1993, but the time for filing a petition has run and no petition has been filed.

The Fifth Circuit has also held that a False Claims Act *qui tam* relator had standing, *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 460 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978), but there is some ambiguity whether the court predicated its decision on statutory or constitutional grounds.

[30] *Id.* at 1154; *accord United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d at 49.

sistent with the Ninth Circuit's determination that the qui tam provisions comport with the separation of powers. The Second Circuit concluded, as did the court below, that the "*qui tam* provisions do not usurp the executive branch's litigating function because the statute gives the executive branch substantial control over the litigation." *Id.*

There is only one other circuit in which a challenge to the Act's constitutionality is even pending, the Sixth Circuit, in an appeal that has been briefed and is awaiting argument.[31] There, however, the constitutional challenge is being made by a contractor in an appeal from an award of attorneys' fees to a qui tam relator in a case which the government took over and settled, and, as the petitioner recognizes, the constitutional issues it raises "are largely mooted" in such a case. Pet. Br. at 13.

Since the 1986 amendments to the False Claims Act, constitutional challenges similar to the petitioner's have been presented in a number of district courts in addition to those which resulted in these several appellate cases. In each case the district court upheld the constitutionality of the Act. Of the six reported district court decisions,[32] only three are outside of the Ninth Circuit.

The petitioner does not dispute the unanimity of the lower court precedent, but rather asserts that lower courts have "disagreed on a number of the specific issues." Pet. Br. at 5 & n.4. Any variations in the reasoning of the district court decisions cited by the petitioner do not warrant review by this Court for several reasons.

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[31] *See United States ex rel. Taxpayers Against Fraud and Chester L. Walsh v. General Electric Company, appeals docketed,* Nos. 92–4283 & 93–3015 (6th Cir. Dec. 11, 1992 and Jan. 6, 1993).

[32] *United States ex rel. Robinson v. Northrop Corporation,* 824 F. Supp. 830 (N.D. Ill. 1993); *United States ex rel. Burch v. Piqua Engineering, Inc.,* 803 F. Supp. 115 (S.D. Ohio 1992); *United States ex rel. Givler v. Smith,* 775 F. Supp. 172 (E.D. Pa. 1991); *United States ex rel. Truong v. Northrop Corporation,* 728 F. Supp. 615 (C.D. Cal. 1989); *United States ex rel. Newsham v. Lockheed Missiles and Space Co.,* 722 F. Supp. 607 (N.D. Cal. 1989); *United States ex rel. Stillwell v. Hughes Helicopters,* 714 F. Supp. 1084 (C.D. Cal. 1989).

First, the majority of decisions the petitioner cites were rendered by district courts in the Ninth Circuit. The decision below now governs all proceedings in the Ninth Circuit involving the issues raised by the petitioner.

Second, with respect to the few district court decisions rendered by district courts in other circuits,[33] any permutations in their analyses may be addressed through the ordinary process of appellate review. Differences in the reasoning of district courts, which have without exception affirmed the constitutionality of the Act, do not warrant the investment of this Court's resources. Moreover, these district court decisions preceded the decision below. The Ninth Circuit has now dealt comprehensively with these issues, and together with the decision of the Second Circuit, its decision will now provide additional guidance for district courts.

III.

THERE ARE NO OTHER REASONS JUSTIFYING THIS COURT'S REVIEW OF THE DECISION BELOW

There are no other reasons justifying this Court's review of the interlocutory decision below, which only clears the way for further proceedings in the district court. Indeed, there are affirmative reasons for denying review of the constitutionality of a statute whose most recent amendments continue to be the subject of interpretive development in the lower courts. Certainly, none of the policy arguments presented by the petitioner justify review, and those policy arguments, which are the province of Congress, continue to be evaluated by that body.

This case presents no special circumstances warranting departure from this Court's "normal practice of denying

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[33] *United States ex rel. Robinson v. Northrop Corporation*, 824 F. Supp. 830; *United States ex rel. Burch v. Piqua Engineering, Inc.*, 803 F. Supp. 115; *United States ex rel. Givler v. Smith*, 775 F. Supp. 172. A fourth case cited did not involve the False Claims Act. *See* Pet. Br. at 5 n.4 (citing *United States ex rel. Yellowtail v. Little Horn State Bank*, 828 F. Supp. 780 (D. Mont. 1992)).

interlocutory review."[34] The record below reflects little activity in this case other than the litigation of petitioner's constitutional claims, which has halted further proceedings. The Ninth Circuit has now ruled on the petitioner's claims in a manner consistent with the decisions of other courts and there may never be a need for this Court to rule on these issues in this case because, as the petitioner observes, "the vast majority of qui tam suits in which the Government elects not to intervene typically never get to trial, thus mooting the constitutional issues." Pet. Br. at 29. Rather than demonstrating, as petitioner suggests, that the issues are capable of evading review, the dismissal of nonmeritorious cases and the settlement of other cases in favor of the government's interests is a product of the ordinary process of litigation. At best, petitioner's claim is that some litigation under the Act will be frivolous, but that may be said of any law, and the Act provides a specific remedy for such cases.[35]

Moreover, there is every reason to believe that the controls over qui tam litigation that the Act affords the Executive Branch, many of which have not yet been put to use in the lower courts, are fully adequate to address petitioner's concerns about potential infringement of Executive prerogatives. The court of appeals emphasized, con-

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[34] *Estelle v. Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting); *American Construction Co. v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893) (stating that "this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause"). As Justice Brennan has observed, "granting certiorari at an interlocutory stage of a case when allowing the case to proceed to its final disposition below might produce a result that makes it unnecessary to address an important and difficult constitutional question" would not be "faithful to the *Ashwander* principle not to address constitutional issues if there is a way properly to avoid doing so." William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 231-32 (1983).

[35] 31 U.S.C. § 3730(d)(4) (providing that a court may award a prevailing defendant reasonable fees and expenses if the action was frivolous).

sistent with the admonitions of this Court, that any ambiguities in the Act, in regard to the powers of the government to protect its interests, should be construed in a manner that preserves the constitutionality of the statute. Pet. App. at 18a n.8 (citing *Morrison,* 487 U.S. at 682; *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 841 (1986)). Indeed, courts have construed the Act to enable the government to protect its interests by intervening solely in order to dismiss a defendant from a qui tam action,[36] or solely to appeal the dismissal of a defendant.[37] The Department of Justice also has stated that the courts have applied the statute to accommodate the Executive's interests.[38]

The petitioner's several policy arguments also fail to provide a basis for review. Petitioner argues that review by this Court is necessary because qui tam actions will be expanded to redress fraud outside of defense procurement, Pet. Br. at 25-27, and expresses particular concern that the Act's qui tam provisions will be used "in combatting health care fraud against the Government." *Id.* at 26 (quoting a sense of the Senate provision in an unenacted bill). Whether the government is being defrauded in the administration of defense programs or health care programs makes no difference in terms of the impact on the United States Treasury and the government's need for redress.[39]

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[36] See *Juliano v. Federal Asset Disposition Ass'n,* 736 F. Supp. 348 (D.D.C. 1990), *aff'd,* 959 F.2d 1101 (D.C. Cir. 1992) (table).

[37] *United States ex rel. McGough v. Covington Technologies,* 967 F.2d 1391 (9th Cir. 1992).

[38] *See* 1990 Hearing, *supra* n.12, at 13 (testimony of Ass't Att'y Gen. Gerson) ("Where we have required judicial interpretations, we seem to be able to get them.").

[39] As the Senate Judiciary Committee stated in reporting the 1986 amendments, "Fraud permeates generally all Government programs ranging from welfare and food stamps benefits, to multibillion dollar defense procurements to crop subsidies and disaster relief programs." S. Rep. No. 99-345, at 2, 1986 U.S.C.C.A.N. 5267. The qui tam provisions have already been used in nondefense fields such as health care to recover substantial amounts for the government. *See, e.g.,* Letter of

Continued

The petitioner also suggests that review is necessary to permit Congress to explore alternatives and adopt a "timely remedy," such as increasing the number of government attorneys. Pet. Br. at 27. Whether fraud should be redressed by hiring more government investigators and attorneys, or by qui tam actions, is a policy judgment for Congress.[40] In any event, petitioner's dislike of Congress's choice is not shared by either of the policy-making branches of the government, which continue to evaluate and seek to improve the implementation of the Act. Since 1986, Congress has monitored the Act's implementation,[41] and to date the consensus view has been that the qui tam provisions "have worked resoundingly well, to the tune of $500 million and counting."[42] When particular improvements have been warranted, Congress has amended the Act, for example in 1988 by adding a provision that would prevent a qui tam relator who perpetrated a fraud from obtaining any recovery under the

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Ass't Att'y Gen. Frank W. Hunger to Howell Heflin, Chairman of the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary, *reprinted in S. 841, The False Claims Amendments Act of 1993: Hearing Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. 2 (1993) (hereinafter "1993 Hearings") (citing recovery of $100 million against National Health Laboratories for Medicare, Medicaid and CHAMPUS fraud).

[40] *Tigner* v. *Texas*, 310 U.S. 141, 148 (1940) ("Whether proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice."); *see also Spann v. Colonial Village, Inc.*, 899 F.2d at 30 (noting that Congress has relied on the aid of private individuals to enforce laws because the resources of public officials are limited).

[41] See, e.g., 1993 Hearings, *supra* n.39; *False Claims Act Technical Amendments of 1992: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992); 1990 Hearings, *supra* n.12.

[42] 1993 Hearings, *supra* n.39, at 10 (statement of Rep. Howard Berman).

statute, while guaranteeing the Department of Justice's ability to pursue the case.[43]

The Department of Justice has likewise expressed to the Congress its support for the qui tam regime.[44] The Department recently reported to the Congress that "the False Claims Act has been a success which has substantially benefitted the United States. . . . No one can look at the ever increasing recoveries in *qui tam* cases and come to any other conclusion."[45] Even assuming the petitioner is correct, that the bulk of rewards from qui tam cases are from cases the government joins, that is entirely consistent with the Act's purpose of encouraging individuals with information to initiate actions, to permit the government to identify the cases to take over, and to let private individuals devote their own resources to the remainder. If the government chooses to join the cases brought by relators in which the recoveries are likely to

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[43] Pub. L. No. 100–700, §9, 102 Stat. 4631, 4638 (1988), *codified at* 31 U.S.C. §3730(d)(3).

[44] Petitioner cites an "opinion" by former Attorney General Barr while serving as Assistant Attorney General for the Office of Legal Counsel that the Act is unconstitutional. Pet. Br. at 4. Although the document was published in a volume of Opinions of the Office of Legal Counsel, 13 Op. Off. Legal Counsel 249 (1989), it is actually a memorandum to then Attorney General Thornburgh about an intramural dispute between, on the one side, the Civil Division and Office of Legal Counsel, and on the other side, the Solicitor General's office, which supported the facial constitutionality of the Act, which was the only question decided by the court below. *Id.* at 250; *see also id.* at 284. The Department of Justice disavowed Mr. Barr's view in a letter filed with the court below, stating that it "was never adopted by the Attorney General, and does not represent the position of the United States." Letter of Acting Assistant Attorney General Stuart E. Schiffer to the Clerk of the United States Court of Appeals for the Ninth Circuit, *filed in United States ex rel. Madden v. General Dynamics Corp.*, No. 92–56042 (Mar. 31, 1993).

[45] Letter of Ass't Att'y Gen. Frank W. Hunger to Howell Heflin, Chairman of the Subcomm. on Courts and Administrative Practice of the Senate Judiciary Committee, *reprinted in* 1993 Hearings, *supra* n.39, at 1–2 (citing recoveries since 1986 of approximately $400 million, or one third of the total recoveries under the Act, from approximately 80 qui tam lawsuits).

be the largest, then the Act is working, precisely as intended, to enlist the aid of private individuals to help the government "obtain information about fraud that it did not independently have and recover sums it might not have otherwise been able to identify." *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 93-817

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MOTION FILED JAN 4 P.M.

THE BOEING COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA
ex rel. KEVIN G. KELLY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF FOR HUGHES AIRCRAFT COMPANY AND LOCKHEED CORPORATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Hughes Aircraft Company and Lockheed Corporation hereby respectfully move for leave to file the attached brief as amici curiae in this case. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has declined to consent.

The question in this case is the constitutionality of the *qui tam* provisions of the False Claims Act, 31 U.S.C. 3730(b)-(g), which allow private parties to sue government contractors in the name of the United States for alleged fraud committed against the United States. Hughes Aircraft Company and Lockheed Corporation are major domestic corporations that do a substantial amount of business pursuant to contracts with the United States gov-

ernment. Hughes and Lockheed have each been the target of unmeritorious *qui tam* suits brought by private plaintiffs and are likely to be subjected to more such suits in the future.

Qui tam suits severely prejudice companies like Hughes and Lockheed even if ultimately dismissed for lack of merit. The adverse publicity and interference with an ongoing contractual relationship that attends the institution of the lawsuit is not wiped away when the suit is dismissed months or years later. The constitutional separation of powers structure that places the responsibility for law enforcement with Executive Branch officials sworn to do justice and uphold the public interest, rather than with private individuals motivated solely by the prospect of damage awards, is designed to shield the public from the adverse consequences of such meritless lawsuits. Accordingly, Hughes and Lockheed have a strong interest in having these constitutional safeguards apply to the False Claims Act, and we believe the Court would benefit from their views on the question presented here.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-817

THE BOEING COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA
ex rel. KEVIN G. KELLY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR HUGHES AIRCRAFT COMPANY AND LOCKHEED CORPORATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

Hughes Aircraft Company and Lockheed Corporation are major domestic corporations that do a substantial amount of business pursuant to contracts with the United States government. Each has been the subject of *qui tam* suits brought under Section 3730(b) of the False Claims Act by private individuals in the name of the United States, in which the government has investigated the allegations and declined to join the suit. Some of these suits have been dismissed, but others are still pending. As the volume of *qui tam* suits continues to rise each year, it is likely that Hughes and Lockheed will be the

target of new suits in which private individuals seek to obtain windfall recoveries.

Even when the government declines to join such *qui tam* actions because they lack merit, the suits substantially prejudice companies like Hughes and Lockheed. Companies named in these actions suffer public dishonor through the accusation, in the name of the United States, that they have committed fraud against the government. The effects of that kind of stigmatization are not undone when the *qui tam* relator's claim is dismissed as unfounded—an event that may occur years later and never attracts the splash of publicity that attends the commencement of such a suit. In addition, the defendants must allocate large amounts of scarce resources to respond to what typically are extremely broad discovery requests and onerous litigation demands.

In the absence of the *qui tam* provisions, companies would have to endure these burdens only if a prosecutor acting in the public interest concluded that a suit by the United States was warranted. Under the current system, however, companies are exposed to these burdens at the whim of any private citizen acting from the motivation of personal enrichment. Accordingly, Hughes and Lockheed have a strong interest in the question of the constitutionality of the *qui tam* provisions of the False Claims Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. The False Claims Act, 31 U.S.C. §§ 3729-3733, is the primary civil enforcement weapon of the United States against fraud and false claims, providing for the recovery by the government of treble damages and civil penalties. Section 3730(a) requires the Attorney General "diligently [to] investigate a violation" of the Act and further provides that the Attorney General "may bring a civil action" against a person found to have committed a violation. That provision for enforcement

by the Attorney General, of course, fully accords with our constitutional structure and is not the subject of this case.

In 1986, however, Congress greatly expanded the availability of Sections 3730(b)-(g) of the Act, known as the *qui tam* provisions, which raise serious constitutional problems. Indeed, the Department of Justice's Office of Legal Counsel advised the Attorney General in 1989 that these provisions are "patently unconstitutional," dismissing the issue presented here as "not even a close question." 13 Op. Off. Legal Counsel 249, 1989 OLC LEXIS 25, *6 (July 18, 1989). Section 3730(b) allows any person to "bring a civil action for a violation of [the Act] for the person and for the United States government . . . in the name of the Government." Even if the United States decides to intervene in such a suit to litigate what is undeniably a government claim, the plaintiff, or *qui tam* relator, continues to participate in the litigation as a party and pockets a substantial percentage of any recovery.

B. The *qui tam* provisions of the False Claims Act represent a deliberate and significant incursion into the most elemental prerogatives of the Executive Branch. They strip the Executive of the ability to make the fundamental decision whether to try to vindicate the interests of the United States by commencing a lawsuit. Instead, Congress has delegated full authority to make that decision to private individuals, who have no connection whatsoever to the government and whose interests often diverge from those of the United States. And once a private party commences such a suit, almost invariably without the knowledge of government officials, the power of the Executive to control that litigation is severely curtailed.

The ultimate effect of the *qui tam* provisions is to divest the Executive Branch of much of its core power to "take care that the Laws be faithfully executed." Art. II, § 3. That is no accident; in 1986 Congress decided to encourage *qui tam* actions because of its expressed

dissatisfaction with the way in which the Executive had been enforcing the False Claims Act. The *qui tam* provisions are thus a purposeful effort by Congress to reassign the President's authority for enforcing the False Claims Act to the public at large and to replace the Department of Justice with private bounty hunters as the government's principal attorneys in fraud cases. This encroachment by Congress on the prerogatives of the Executive cannot withstand constitutional scrutiny.

By deliberately assigning significant enforcement authority to private citizens, Congress violated not only the basic constitutional separation of powers structure but also the specific injunction of the Appointments Clause, art. II, § 2, cl. 2. The *qui tam* relator is representing the interests of the United States in civil enforcement litigation; he has suffered no personal injury that could give him standing to sue in his own right. Therefore, he is performing the duties of an "Officer of the United States" —a position that constitutionally can be held only by an Executive Branch appointee. *See Buckley v. Valeo,* 424 U.S. 1, 140 (1976).

C. It is imperative that this Court act expeditiously to resolve the constitutional problems raised by the *qui tam* provisions. Those provisions unjustifiably harm private defendants as well as undermine the United States' dominion over its own litigation and government programs. *Qui tam* suits subject the accused to litigation burdens, inaccurate but damaging adverse publicity, disruption of their government contracts, and other adverse consequences that are not relieved when the suit is dismissed as unmeritorious. The Constitution affords potential defendants protection against these adverse effects by guaranteeing that the decision to bring suit will be made by an Executive Branch official bound to act in the interests of justice, not by a private party motivated solely by the prospect of economic gain. With the number of meritless *qui tam* suits increasing each year, the Court should act promptly to define the limits of congressional authority

and to restore the protection afforded by the constitutional separation of powers structure.

ARGUMENT

I. THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT UNCONSTITUTIONALLY ENCROACH ON THE AUTHORITY AND DISCRETION OF THE EXECUTIVE BRANCH

A. The *Qui Tam* Provisions Violate the Constitutional Separation of Powers Structure

1. It is beyond dispute that the separation of powers among the three branches lies at the heart of "[t]he structure of our Government as conceived by the Framers of our Constitution." *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2310 (1991). At the core of the Executive power is the responsibility to "take care that the Laws be faithfully executed." Art. II, § 3. "Legislative power, as distinguished from executive power, is the authority to make laws, *but not to enforce them or appoint the agents charged with the duty of such enforcement.* The latter are executive functions." *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) (emphasis added). This irrefutable principle places the conduct of the government's litigation squarely within the Executive's authority. "A lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley v. Valeo*, 424 U.S. 1, 138 (1976).

The *qui tam* provisions impermissibly divest the Executive of the most fundamental component of law enforcement authority—the decision whether to initiate a lawsuit in the first place. A prosecutor's decision to indict "has long been regarded as the special province of the Executive Branch." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). The same is true in the civil enforcement

context, where this Court has noted that whether an administrative agency will enforce the law in a particular instance "is a decision generally committed to an agency's absolute discretion." *Id.* at 831.

Prosecutorial discretion is a critical government function because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id.* In the False Claims Act setting, for example, the government may decide that other available civil, criminal, administrative, or contractual sanctions are a more appropriate means of resolving a perceived problem. It may determine that national security or other interests preclude a public airing and trial of the matter. It may conclude that a False Claims Act suit would interfere with performance of the contract or cause an unacceptable delay in delivery of critical supplies. Or the Executive may properly conclude that the allegations lack sufficient merit to make it appropriate for the United States to accuse the defendant of fraud.

The balancing of these and other considerations and the initial decision to sue are the Executive's constitutional responsibility; Congress is not free to delegate to the general public the decision to initiate an enforcement action. Nor is there any sound policy reason to do so. If Congress believes that providing a financial incentive to private citizens would enhance the Executive's enforcement efforts, it can follow the model of the Internal Revenue Code and establish rewards for information concerning False Claims Act violations—without divesting the Executive of its prosecutorial discretion. *See* 26 U.S.C. § 7623; Treas. Reg. § 301.7623-1.[1]

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[1] A good example of the way that *qui tam* destroys the Executive's ability to further the public interest through its exercise of prosecutorial discretion is *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 777 F. Supp. 195 (N.D.N.Y. 1991), *aff'd*, 985 F.2d 1148 (2d Cir.), *cert. denied*, 113 S. Ct. 2962 (1993). The *qui tam* relator (a law firm) claimed that a contractor

Even in those cases in which the Executive believes litigation is appropriate, the *qui tam* provisions improperly constrain its right to direct the litigation on behalf of the United States. If the government intervenes in a case, the *qui tam* relator remains a party—free to pursue the litigation in parallel with the Department of Justice in a manner that may be inconsistent with the positions and interests of the Executive. This supposed "representative" of the government often acts as an adversary of the Executive Branch's duly appointed officials.

2. The *qui tam* provisions interfere with the Executive's prerogatives to a significantly greater extent than does the independent counsel statute upheld by this Court in *Morrison v. Olson*, 487 U.S. 654 (1988). The Court there concluded that several features of the statute "give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.* at 696. Those features relied upon by the Court as conferring Executive control over the independent counsel, however, are notably absent from the *qui tam* provisions of the False Claims Act.

The Court emphasized that the independent counsel statute "gives the Executive a degree of control over the power to initiate an investigation" because an independent counsel may be appointed only pursuant to a specific request by the Attorney General—a decision that "is committed to his unreviewable discretion." *Id.* This is precisely where the government has *no* control over a

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had committed fraud in supplying helicopters that did not comply with contract specifications. In fact, "senior Army officials responsible for the Black Hawk program were aware of this problem," but the contracting parties were working towards an engineering solution without litigation. *Id.* at 204. To the relator, however, the needs of the Army, the timely delivery of essential equipment, the commitments of senior Army officials, and the extent to which litigation would disrupt the contracting process were irrelevant; its interest lay solely in the potential windfall recovery.

qui tam suit. The relator is not required to obtain the Executive's approval, or even to notify the Executive, before filing suit. Similarly, there are no analogous provisions in the False Claims Act for the other attributes of control identified in *Morrison*—the power to remove the independent counsel for good cause, the statutory requirement that the independent counsel comply with Department of Justice policies, and the Attorney General's power at the outset to circumscribe the independent counsel's jurisdiction. *See id.*

The court of appeals acknowledged that, "[c]learly, the government has greater authority to prevent the initiation of prosecution by an independent counsel than by a qui tam relator." Pet. App. 22a. But the court nonetheless concluded that "the Executive Branch exercises at least an equivalent amount of control over *qui tam* relators as it does over independent counsels." *Id.* at 23a. That conclusion rests almost entirely on the court's assertion that "because the Executive Branch has power, albeit somewhat qualified, to end qui tam litigation, it is not significant that it can not prevent its start." *Id.* at 22a. Both the premise and the conclusion of that assertion are seriously in error.

In fact, the False Claims Act does not give the Executive Branch the power to end *qui tam* litigation. The court of appeals apparently was relying on Section 3730 (c)(2)(A), which provides that, if the government decides to intervene in the *qui tam* action, it "may dismiss the action notwithstanding the objections of the" *qui tam* relator, *but only after "the court has provided the person with an opportunity for a hearing on the motion"* (emphasis added). If it wants to dismiss its own claim, just as if it wants to settle (§ 3730(c)(2)(B)), the government is at the mercy of court approval.

Thus, the Executive's ability to terminate litigation that disserves the interests of the United States is not merely

"somewhat qualified," as the court of appeals would have it (Pet. App. 22a); rather, it is constrained by an unbridled veto power of the trial court that is a significant intrusion into the Executive's constitutional sphere of authority. As the court of appeals' opinion recognized (Pet. App. 21a n.11), when the Executive seeks to dismiss a claim, Congress contemplated not only an argument before the judge but also, in some instances, an *evidentiary* hearing. The purpose of these hearings is to allow the *court*—not the Executive—to determine whether the government has "fully investigated the allegations" or whether dismissal is appropriate in light of the existing evidence. *Id.*, quoting S. Rep. No. 345, 99th Cong., 2d Sess. 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.

The degree to which this judicial veto power interferes with the Executive's authority is illustrated by *Gravitt v. General Electric Co.*, 680 F. Supp. 1162 (S.D. Ohio), *appeal dismissed*, 848 F.2d 190 (6th Cir.), *cert. denied*, 488 U.S. 901 (1988). A private citizen commenced a *qui tam* suit on behalf of the United States against General Electric; the Department of Justice entered the suit and negotiated a settlement. The question of court approval was referred to a magistrate who took almost two years to recommend approval. The district court then held two days of evidentiary hearings and decided to reject the settlement and set the case for trial. The court acknowledged that it had not "determine[d] that there was in fact fraudulent conduct in this case," but it pointed out that there had been other instances of fraud with other manufacturers, "such as 'a $500.00 hammer.'" 680 F. Supp. at 1164. Noting that the relator did not appear to be paranoid and that "even more important his counsel is a highly respected and exceedingly competent member of the bar," the court concluded that the government had not sufficiently investigated the allegations to ensure the adequacy of the proposed settlement. *Id.* at 1164-65. The False Claims Act leaves the Executive powerless to resist

this type of judicial intrusion into its law enforcement activities, no matter how irrational, and therefore it plainly does not give the Executive the "power . . . to end qui tam litigation." Pet. App. 22a.[2]

In any event, even if the Executive had more power to terminate *qui tam* litigation, that would not render insignificant the Executive's complete lack of control over its initiation. As we have noted (page 6 *supra*), the Executive may deem litigation undesirable because accusations of fraud (particularly unfounded ones) can seriously damage an important contractual relationship and interfere with elements of performance that are critical to the Nation's well-being. Dismissal of the litigation months, or even years, later cannot undo this damage. And by that time it will likely be too late for the Executive to pursue other forms of redress that it might have preferred initially. Thus, the court of appeals is simply mistaken in concluding that the *qui tam* provisions interfere with the Executive's law enforcement responsibilities to a lesser extent than does the independent counsel statute upheld in *Morrison*.

3. The separation of powers problems inherent in the *qui tam* provisions are exacerbated by the extent to which they disrupt ongoing contracts. As a practical matter, *qui tam* actions impermissibly interfere not only with the Executive's exercise of its law enforcement authority but also with its basic function of managing government programs. In some cases, *qui tam* actions challenge discretionary decisions made by Executive Branch officials and are essentially a means for a private citizen to try to im-

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[2] Some members of this Court have indicated that a court's power to reject a settlement reached by the government, without more, can be an unconstitutional infringement upon the Executive's authority to enforce the law. *See Maryland v. United States*, 460 U.S. 1001, 1004 (1983) (Rehnquist, J., dissenting); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 156-57 (1967) (Stewart, J., dissenting).

pose his or her own view of how a government program should be managed.

For example, in *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991), the Court upheld the right of a former government lawyer to pursue a *qui tam* suit that, in essence, was an attempt to revive an internal debate that he had lost during his government service. While serving as an assistant district counsel for the Army Corps of Engineers, Hagood had refused to draft a contract because he interpreted federal law to preclude the proposed allocation of costs. He called his concerns to the attention of those higher in the chain of command, but both the contracting officer and the district counsel disagreed and overruled his objection. Another lawyer drafted the proposed contract, and the Assistant Secretary of the Army signed it. Six years later, after he retired from the Corps, Hagood brought a *qui tam* suit claiming the contractor's cost claims, which complied with the contract, were "false."

The *Hagood* case is not about fraud against the government, but about a challenge by a private citizen to programmatic decisions by duly authorized government officials. This kind of suit threatens the Executive's basic management capability by undermining the confidence of contracting parties in the Executive's ability to bind the United States. A party must be able to accept the commitment of Executive Branch officials without fear that a private citizen will one day bring a *qui tam* suit charging the party with fraud for adhering to the agreement it made with the Executive. Ultimately, the *qui tam* provisions allow private citizens to pursue a windfall by challenging, not representing, the government and its interests. That power is incompatible with the Executive Branch's constitutional authority.[8]

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[8] Congress's diminution of the Executive's law enforcement authority was deliberate; the legislative history of the 1986 amendments indicates that the expansion of *qui tam* suits was the product

B. The *Qui Tam* Provisions Violate the Appointments Clause

The Constitution explicitly restricts the power to appoint officials who will wield the Executive Power. Article II, § 2, cl. 2 provides that "Officers of the United States" must be appointed by the President, with the advice and consent of the Senate, except that "inferior Officers" also may be appointed by the Courts of Law or the Heads of Departments. Thus, if *qui tam* relators are acting as "Officers of the United States" in bringing lawsuits to enforce the False Claims Act, their authority unquestionably violates the Appointments Clause because they are self-appointed.

Buckley v. Valeo, supra, establishes that the *qui tam* provisions violate the Appointments Clause. This Court there explained that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by" that Clause. 424 U.S. at 126. Emphasizing that conducting civil litigation to enforce the laws of the United States is a quintessentially Executive function (*id.* at 138-39), the Court concluded that the provisions "vesting in the [Federal Election] Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" were unconstitutional because "[s]uch functions may be discharged only by persons who are 'Officers of the United States.' " *Id.* at 140. That con-

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of Congressional dissatisfaction with the way the Executive had been exercising its enforcement discretion under the False Claims Act. *See* 131 Cong. Rec. 22,322 (1985) (Statement of Sen. Grassley) ("Government bureaucracy is . . . unwilling to guard against or aggressively punish fraud"); 132 Cong. Rec. 22,339 (1986) (Statement of Rep. Berman) ("the Department of Justice has not done an acceptable job of prosecuting defense contractor fraud"); *see generally* S. Rep. No. 345, 99th Cong., 2d Sess. 25-26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290-91.

clusion is fatal to the constitutionality of the *qui tam* provisions.

The court of appeals sought to avoid the impact of the Appointments Clause by asserting that the *qui tam* relator does not wield sufficiently "significant authority" over government litigation to qualify as an "Officer of the United States." Pet. App. 29a-31a. The court reasoned that "the Executive Branch retains 'sufficient control' of relators such that their exercise of authority to sue on behalf of the United States does not 'impermissibly undermine' executive functions." *Id.* at 29a.

This reasoning is flawed. Even if it were true that the Executive retains sufficient control of relators to prevent its executive functions from being "impermissibly undermined" (and we vigorously disagree), that would not negate the fact that *qui tam* relators do exercise "significant authority" over False Claims Act suits. The unfettered power to institute such suits and the ability to litigate them to a conclusion surely amounts to "significant authority." Indeed, this is precisely the level of authority that most troubled the Court in *Buckley*. The Court there stated that "[t]he Commission's enforcement power, *exemplified by its discretionary power to seek judicial relief*, is authority" that must rest in the Executive Branch. 424 U.S. at 138 (emphasis added). The Court in *Buckley* described the limitations on the activities of persons who are not government employees or duly appointed "Officers of the United States"; their duties must be "removed from the administration and enforcement of the public law." *Id.* at 139. The court of appeals does not explain how *qui tam* relators can possibly meet that standard.

The court of appeals also sought to distinguish *Buckley* on the ground that Congress had vested itself with the power to appoint members of the Federal Election Commission, whereas the *qui tam* statute does not

involve similar "concerns about congressional aggrandizement." Pet. App. 31a. But this Court made clear in *Freytag v. Commissioner*, 111 S. Ct. 2631 (1991), that the restrictions of the Appointments Clause do not apply only when Congress seeks to accumulate additional power for itself. "The Appointments Clause not only guards against this encroachment [by Congress] but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Id.* at 2638. The False Claims Act's open invitation to all citizens to appoint themselves government prosecutors runs afoul of the Appointments Clause just as surely as if Congress had arrogated that appointment power to itself.

II. THE COURT SHOULD GRANT CERTIORARI NOW TO RESOLVE THE UNCERTAINTY OVER THE CONSTITUTIONALITY OF THE *QUI TAM* PROVISIONS

It is important for this Court to act promptly to resolve the questions presented in this case. The issues are ripe and clearly framed for this Court; nothing is to be gained by encouraging further litigation in the lower courts. Further delay will serve only to multiply the harm caused by unjustified *qui tam* lawsuits.

A. The volume of *qui tam* litigation has exploded since the 1986 amendments to the False Claims Act. That growth is not caused by any change in the level of false claims made against the government; rather, it reflects a growing awareness by citizens, notably lawyers, of the possibility of obtaining a substantial recovery by suing government contractors in the name of the United States. Many plaintiffs are eager to take a chance at hitting the jackpot and are not dissuaded merely because the defendant has done nothing wrong. These claims unnecessarily burden the judicial system and strain the

resources of both the Executive Branch that must investigate them and the defendants who are unjustly accused.[4]

Congress will not act to stem the tide of these meritless suits; it is more likely to exacerbate the problem by expanding the availability of *qui tam* actions. Senator Grassley recently exhorted his colleagues that the remedy "can be used in whatever circumstances Congress deems appropriate . . . . The only boundary to its use is congressional imagination." 139 Cong. Rec. S875 (daily ed. Jan. 28, 1993). If the decision below is allowed to stand, Congress may be tempted to turn other Executive duties over to private bounty hunters—such as enforcement of the federal tax laws. Thus, prompt consideration of the issues presented here is needed to remind Congress that the Constitution is also a "boundary" to the use of *qui tam* provisions to divest the Executive Branch of its authority to enforce the laws.

B. Allowing the *qui tam* provisions to remain in force without resolving their constitutionality will cause substan-

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[4] The abuse of the *qui tam* provisions by relators was detailed in testimony before Congress given by then-Assistant Attorney General Gerson in 1992. He stated that many of these cases are "frivolous," presenting "no evidence, no information based on personal knowledge, or are 'kitchen sink' complaints containing every conceivable broad allegation without any specific evidence whatsoever." *False Claims Act Technical Amendments of 1992: Hearing on H.R. 4563 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee of the Judiciary*, 102d Cong., 1st Sess. 24 (1992) (Statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, Dept. of Justice). The government declines to appear in most of the cases it investigates, and the recovery generated for the United States by *qui tam* relators in those cases has been minuscule—amounting to $225,000, or .0002% of the total fraud recoveries by the government. *Id.* at 25-26. The recent downturn in the defense industry is likely to trigger a further increase in such wasteful litigation; many *qui tam* relators are disgruntled former employees, and some of them try to buttress wrongful termination claims with insubstantial False Claims Act allegations. *See id.* at 28.

tial harm to innocent parties. The separation of powers doctrine violated by those provisions is not geared exclusively to defending the prerogatives of the individual branches of government. Rather, "[t]he ultimate purpose of this separation of powers is to protect the liberty and security of the governed." *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 111 S. Ct. at 2310.

Qui tam suits, even if they ultimately prove completely unmeritorious, severely prejudice defendants. The commencement of such a suit is a public accusation, *in the name of the United States*, that the defendant has been stealing public money. Regardless of the outcome of the suit, the defendant must suffer the damage to its reputation and character that results from such an accusation.[5]

Given these consequences, this Court has repeatedly recognized the importance of having an unbiased prosecutor who acts in the public interest. The government prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). " 'The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.' " *Young v. United States*

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[5] The adverse impact of such suits is exemplified by *United States ex rel. Denlinger v. Hughes Aircraft Co.*, No. SACV89-410 AHS (C.D. Cal.). Denlinger filed a *qui tam* suit against Hughes seeking *$9.6 billion*. Television stations prominently reported the suit and, complete with video backdrop of bodies floating in the Persian gulf, suggested that Hughes' alleged "fraud" had contributed to the mistaken shooting down by the United States of an Iranian airliner. In fact, the allegations were completely without merit, and the Department of Justice declined to appear in the case. Ultimately, the *qui tam* relator was sanctioned for discovery abuse and dropped the litigation.

ex rel. Vuitton et Fils, S.A. 481 U.S. 787, 803 (1987) (citation omitted).

In *Young*, this Court found that the constitutionally mandated level of impartiality could not be attained if a private party's counsel acts as prosecutor of the criminal contempt of the other party. The Court emphasized the dire consequences that attend a formal government accusation of misconduct, noting that "[e]ven if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life." *Id.* at 814. Accordingly, this Court concluded that it was necessary to "have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice" —an assurance that is absent when a private party with its own motives acts as prosecutor. *Id.*

The same considerations apply with respect to civil enforcement. In connection with the imposition of civil penalties for violations of the Fair Labor Standards Act, the Court observed that 'the decision to enforce . . . may itself result in significant burdens on a defendant . . . even if he is ultimately vindicated in an adjudication." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980). Therefore, "a scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* at 249-50.

The *qui tam* provisions create precisely the kind of flawed prosecutorial decisionmaking that the Court disapproved in *Young* and *Jerrico*. The critical decision whether to institute an enforcement action—attended by severe practical consequences to the accused—is ceded entirely to private individuals who have no incentive or obligation to act in the public interest. Their decision is impelled by substantial monetary incentives to make an accusation, with no concern for justice in general or for

the specific ramifications to defendants or to government programs.

So long as the *qui tam* provisions remain in force, government contractors will continue to be denied their constitutional right to a prosecutor who acts in the interests of justice. They will continue to suffer unjustified public opprobrium as a result of meritless lawsuits brought in the name of the United States by individuals seeking personal gain. The Court should review the constitutionality of the *qui tam* provisions and restore the "liberty and security of the governed" that the Framers sought to protect through separation of powers. *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 111 S. Ct. at 2310.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 93-817

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE BOEING COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA
ex rel. KEVIN G. KELLY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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---

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Aerospace Industries Association of America ("AIA") hereby respectfully moves for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari filed by The Boeing Company in this case.*

---

* On behalf of the United States, counsel for respondent Kevin G. Kelly has refused to grant written consent for the filing of the attached brief. It is at least ironic that one of the underlying issues in this case is the propriety of a private party's ability to conduct litigation on behalf of the Government, and counsel for respondent has supplanted the Solicitor General's traditional liti-

A principal issue presented by the petition is the constitutionality of lodging litigating authority regarding fraud claims on behalf of the Government in private parties who have suffered absolutely no injury of their own—and allowing that litigation to proceed even without the Government's participation and even after the Government has concluded that no basis exists to support the plaintiff's allegations. Those fraud claims may be pursued against private parties that contract with the Government as well as against recipients of government grants, and thus potentially involve the actions of nearly every governmental department and agency. Even so, many claims, including the claims at issue in this case, have focused upon actions of many of the primary corporations engaged in contract work in the defense and aerospace industries.

The Aerospace Industries Association of America (AIA), with approximately 50 members, represents the nation's principal manufacturers of commercial, military, and business aircraft, missiles, spacecraft, and related components and equipment. All of these companies provide military goods and services under contract with the United States Government.

The member companies of this association now routinely face the threat of litigation brought by private parties pursuant to the provisions of the False Claims Act that are the subject of the petition for certiorari. Even when the Government is satisfied that a member of AIA has performed all of its contractual duties flawlessly, a company may still be subject to expensive and protracted litigation brought by any number of "bounty hunters" who claim no personal injury, but who purport to represent the Government's interests. The decision of the Ninth Circuit for which review is sought provides expansive authority for suits maintained without the par-

---

gating role before this Court, and has done so in a way that imposes a burden on this Court that the Solicitor General clearly would have avoided.

ticipation of or control by the Department of Justice and without regard to the evaluation of the contractor's performance by the Government officials overseeing the contract subject to private litigation. *Amicus* therefore wishes to emphasize the importance of the issue for which petitioner seeks review and the conflict between the Ninth Circuit's decision and fundamental constitutional principles set forth in decisions by this Court.

In addition, *amicus* wishes to emphasize and describe the distorting and detrimental effects that the type of suits at issue in this case have upon the government contracting process, particularly for contracts entered into by *amicus's* members and designed to further the nation's defense capabilities and national security. The "cash bounty" provisions of the 1986 Amendments to the False Claims Act have subjected *amicus's* members to an onslaught of frivolous litigation, and the enormous resources that must be devoted to those suits will, inevitably, be reflected in reduced resources available to produce the finest defense products and in higher costs to the Government and American public for the products that are manufactured.

As Government officials have indicated, and as *amicus* can confirm, a stable and productive relationship between the Government and suppliers of defense products requires that the Government—rather than private parties and Article III courts—retain the ability to determine whether breaches of contract, including fraudulent breaches, have occurred and to initiate, maintain, and terminate litigation where appropriate. The underlying constitutional issues in this case concern precisely whether this control will be lodged in the Government or in private parties who have suffered absolutely no injury and have no particular interest in the government contract at issue.

Amicus is thus uniquely able to present this Court with information regarding the potential effect of the suits

at issue upon the defense contracting process, and to situate the legal issues in this case in a broader social and economic context. Accordingly, AIA respectfully requests that the Court grant AIA leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Constitution permits Congress to authorize private citizens who have suffered no injury to litigate civil fraud claims on behalf of the United States.

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---

BRIEF OF THE AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* is set forth in the accompanying motion for leave to file this brief.

REASONS FOR GRANTING THE PETITION

In this case, the Ninth Circuit upheld the ability of a private citizen who has suffered no injury of his own to invoke an Article III court's jurisdiction to adjudicate a claim that purports to rest upon injury to the Government alone—all without the authorization or participation of the Department of Justice or any other Executive

official. The Ninth Circuit's reasoning presents and condones the most extreme version of the conflict between the controversial 1986 amendments to the *qui tam* provisions of the False Claims Act and traditional standing, separation of powers, and related doctrines. Although both theorists and litigators have questioned the constitutionality of adjudication of *qui tam* suits even when the government endorses and intervenes in the private party's suit, the constitutional conflict is most clear when, as in this case, a private party is permitted to proceed without the control or approval of the Executive.

For this reason, this case is a particularly compelling vehicle by which to resolve an issue of fundamental constitutional principle and dramatic public importance created by two contradictory developments of the past decades. On the one hand, the 1986 Amendments to the False Claims Act revived moribund statutory provisions in a manner that created an onslaught of private relator cases that may now arise from the routine contractual dealings of nearly every governmental department or agency. The potential for such suits, particularly when the Government declines to intervene, dramatically impairs the dealings between the Government and those who do business with it. On the other hand, this Court over the past two decades has elaborated the requirements imposed by the Constitution's Appointments Clause, the Constitution's separation of powers into three distinct Branches, and Article III's standing requirements in ways that are wholly at odds with the *qui tam* procedure as developed in 1986. This Court should review whether those requirements in fact preclude this recent burst of *qui tam* litigation before additional expense and burden are imposed on those who do business with the federal government.

1. Review is warranted because this suit, and the hundreds of suits like it, can be maintained only in contravention of "the core component of [Article III] standing"

that "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally-protected interest which is (a) concrete and particularized and . . . (b) actual or imminent, not conjectural or hypothetical." *Lujan* v. *Defenders of Wildlife,* 112 S. Ct. 2130, 2136 (1992) (internal quotations and citations omitted); see also, *e.g., Whitmore* v. *Arkansas,* 495 U.S. 149, 155 (1990); *Allen* v. *Wright,* 468 U.S. 737, 751 (1984); *Simon* v. *Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 41-42 (1976); *Warth* v. *Seldin,* 422 U.S. 490, 508 (1975).

The Ninth Circuit held that the plaintiff in this case could proceed even if he suffered absolutely no injury of any kind to himself and asserted none as the basis of his claim. Permitting such unauthorized private plaintiffs in *qui tam* suits to invoke the district court's jurisdiction violates each element of this "injury in fact" requirement and related Article III standing requirements. The first element absent in these cases is that "[a] plaintiff must *always* have suffered a 'distinct and palpable injury to himself'. . . that is likely to be redressed if the requested relief is granted." *Gladstone* v. *Village of Bellwood,* 441 U.S. 91, 100 (1979) (citation omitted) (emphasis added); see *Lujan,* 112 S. Ct. at 2145; *Warth* v. *Seldin,* 422 U.S. at 500-01.[1] This is an irreducible minimum requirement that simply cannot be displaced by legislative fiat.

Second, fraud against the government cannot serve as a sufficient interest to permit a private plaintiff to invoke Article III because the interest must be particularized rather than generally shared. "By particularized, we mean that the injury must affect the plaintiff in a personal and individual way." *Lujan,* 112 S. Ct. at 2136 n.1; see also

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[1] *Jus tertii* or "third party" standing doctrines are consistent with this principle. Those doctrines allow a plaintiff to challenge an action on the grounds that it infringes the rights of others, but only if the challenged action *also* injures the plaintiff. *See, e.g., Craig* v. *Boren,* 429 U.S. 190, 192-97 (1976).

United States v. *Richardson,* 418 U.S. 166, 176-77 (1974); *Frothingham* v. *Mellon,* 262 U.S. 447 (1923).

Third, the plaintiff's standing in private relator cases is insufficient because the requisite Article III injury must be "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright,* 468 U.S. at 751; see also *Whitmore* v. *Arkansas,* 495 U.S. at 155; *Valley Forge Christian College* v. *Americans United for Separation of Church & State,* 454 U.S. 464, 471 (1982). If the plaintiff in this case possesses standing, then any and all "concerned bystanders" could be authorized to bring lawsuits protesting alleged harms to others who do not consider themselves aggrieved. *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 687 (1973); see *Diamond* v. *Charles,* 476 U.S. 54 (1986) (physician lacked standing to defend a state law restricting abortion when the State had not invoked the Court's jurisdiction).

The possibility of gaining damages through suit is clearly insufficient injury or interest for Article III purposes. "Damages" in *qui tam* cases are merely a windfall or reward, and no "injury" exists to be remedied. See *Diamond* v. *Charles,* 476 U.S. at 70-71 ("Art. III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue," not merely "a byproduct of the suit itself").[2] Although "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy

[2] *Lujan* noted that the Court was not addressing whether Congress could "creat[e] a concrete private interest in the outcome of a suit . . . by providing a cash bounty for the victorious plaintiff," and the decision in the next sentence reaffirms that Article III is not satisfied "by congressional conferral upon *all* persons of an abstract, self-contained, non-instrumental 'right.'" *Lujan* v. *Defenders of Wildlife,* 112 S. Ct. 2130, 2143 (1992) (emphasis in original). This reference does not suggest that Congress could avoid Article III's causation and redressability requirements.

. . . , [it] must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan,* 112 S. Ct. at 2146-47 (Kennedy, J., concurring). Here, there is no sense in which the plaintiff has been injured, and the False Claims Act entitles nearly *all* citizens to bring suits, without regard to whether they are injured.

2. The Ninth Circuit's attempt to circumvent the obvious standing difficulties in this case—the panel's theory that the Government had in some sense assigned *its* injury or claim to the plaintiff, see Pet. App. 46a-47a—not only fails to avoid the standing issue, but creates a conflict with the Constitution's Appointments Clause and related separation of powers doctrines that warrants this Court's review.

a. Initially, as a response to standing objections, the Ninth Circuit's theory is a complete *non sequitur.* Even if some assignment could be imputed on the facts of this case, and even if the *Government* could assign its interest to a private party, and even if such assignments could somehow transfer Article III "injury," the assignment the Ninth Circuit imagines would not satisfy the particularity requirement of Article III. See *supra* p. 3. Even under the Ninth Circuit's theory, the "assignment" is open to any and every citizen, enabling any one of them to file the suit plaintiff initiated. Of course, this is precisely the "generalized grievance" that is insufficient to meet Article III's requirements because "the impact on [plaintiff] is plainly undifferentiated and common to all members of the public." *United States* v. *Richardson,* 418 U.S. at 171, 176-77; see also, *e.g., Allen* v. *Wright,* 468 U.S. at 754; *Valley Forge Christian College,* 454 U.S. at 483.

In fact, the Ninth Circuit's posited "assignment" is entirely fictional, and poor fiction at that. The panel points to nothing that indicates any intent to assign the claim underlying this suit, or even to any governmental

dealings with the plaintiff that could be so construed, and indeed nothing suggests the Government even believed that any such claim existed. To the contrary, following a 40-month investigation including review of more than 400,000 pages of documents, the Government found no basis to intervene in this suit. In the view of the Ninth Circuit, an imagined claim, transferred without formality to a plaintiff barely known to government officials, establishes an "assignment" sufficient to meet the plaintiff's burden of establishing Article III standing. Given the importance of the controversy to the nation's federal contractors, this is a slender reed on which to sustain this radical departure from core Article III requirements.

b. The Ninth Circuit's "assignment" theory encounters more profound jurisprudential difficulties, foremost among them a direct conflict with the Constitution's Appointments Clause, art. II, § 2, cl. 2. According to the Ninth Circuit, a private citizen is entitled to conduct litigation on behalf of the United States. However, this Court has clearly indicated that only "Officers of the United States" may undertake such actions.[3] In *Buckley* v. *Valeo,* 424 U.S. 1 (1976), this Court held that Congress—which itself lacked the power "to enforce [the law] or appoint the agents charged with the duty of such enforcement," *id.* at 139 (internal quotation omitted) —could not bestow enforcement powers on the Federal Election Commission, an agency outside the Executive Branch:

> We hold that these provisions of the Act, vesting in the Commission primary responsibility for conduct-

[3] Art. II, § 2, cl. 2 provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

> ing civil litigation in the courts of the United States for vindicating public rights, violate Art. II, § 2, cl. 2 of the Constitution. *Such functions may be discharged only by persons who are "Officers of the United States" within the language of that section.*

Id. at 140 (emphasis added). Private citizens asserting the Government's rights, such as the plaintiff in this case, are not officers of any sort. Nor, as here, when the Government declines to intervene in a False Claims Act suit, are they controlled by duly appointed officers. Thus, the Appointments Clause as interpreted in *Buckley* bars them from conducting civil litigation in the name of and on the behalf of the United States Government.

The Ninth Circuit presented only policy reasons for avoiding this constitutional command. The court below acknowledged that when the Government declines to participate in *qui tam* litigation and thus the private citizen "retains primary responsibility for the litigation," there "may seem [to be] a close question under *Buckley*." Pet. App. 69a. The court remained untroubled, however, because "the relator's responsibility only extends to a single case" and thus could not amount to "unchecked or unbalanced government power." *Id.* A defendant subject to such a suit could hardly be expected to agree, but in any event, the court's reasoning adopts the wholly unacceptable rationale that constitutional violations are permissible so long as they are "small." [4]

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[4] The court below also relied on the fact that Congress had not aggrandized its powers and that *qui tam* relators were not "officers" because they received no salary and served for no specified term. Pet. App. 69a-70a & n.23. This latter rationale merely restates the issue, and confirms that no Executive officer controls the private plaintiff. And even if the policy of limiting Congressional aggrandizement rather than creating a unified Executive were relevant to interpreting the Appointments Clause, the 1986 Amendments to the False Claims Act reflect *Congress'* effort to limit the Executive's power.

c. In a similarly blithe fashion, the court below disregarded this Court's separation of powers pronouncements regarding the constitutional requisites of both the Executive's powers and the federal Judiciary's. It has long been settled that law enforcement is an "executive function[]." *Springer* v. *Philippine Islands,* 277 U.S. 189, 202 (1928). "A lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' " *Buckley* v. *Valeo,* 424 U.S. at 138 (quoting U.S. Const. art. II, § 3); see *Bowsher* v. *Synar,* 478 U.S. 714, 726 (1986).

The False Claims Act unconstitutionally limits this core Executive function at each stage of litigation. The power "not to prosecute or enforce" is at the core of the Executive's constitutional duty to "take Care that the Laws be faithfully executed," *Heckler* v. *Chaney,* 470 U.S. 821, 831-32 (1985) (quotation omitted), in large measure because the crafting of prosecutorial policy is crucial to shaping the administration of the substantive legislative command. In this and related cases, the Executive's prosecutorial policy also is inextricably intertwined with the ongoing contractual relations with literally thousands of government contractors. Even so, neither the Attorney General nor any contracting official has any control over the commencement of *qui tam* litigation brought in the name of the United States. This interference with the Executive's role is particularly severe when, as in this case, the Executive has declined to undertake litigation after extensive investigation of the allegations that underlie the private plaintiff's claim.

In addition, the Act dramatically limits the Executive's ability to conduct litigation. The private plaintiff acting on its own behalf is permitted to conduct discovery in the Government's name, responds to requests for admissions on the Government's behalf, and may bar subsequent governmental actions through the operation of *res*

judicata.[5] Even when the Government intervenes in an ongoing *qui tam* suit, the statute severely limits its ability to control the litigation. See 31 U.S.C. § 3730(c). The Act's limitations upon the Government's ability to settle a *qui tam* case are similarly restrictive. Just as a decision "not to prosecute or enforce" is "generally committed to an agency's absolute discretion," *Heckler* v. *Chaney*, 470 U.S. at 831, so, too, is the decision to settle a case. *Cf. Maryland* v. *United States*, 460 U.S. 1001, 1004 (1983) (Rehnquist, J., joined by Burger, C.J., and White, J., dissenting from summary affirmance). Even so, the Act constricts the Government's ability to limit the private relator's participation in the suit even when the Government intervenes, see 31 U.S.C. § 3730(c)(2)(C), and the Government may settle litigation only, after a hearing, once the *court* determines "that the proposed settlement is fair, adequate, and reasonable." *Id.* at § 3730(c)(2)(B).[6]

The False Claims Act's distortion of the judicial role mandated by Article III is equally severe. The Act requires the district court to make determinations (such as

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[5] The legislative history of the 1986 Amendments to the False Claims Act confirms that the Government would be bound by judgments secured by private plaintiffs conducting *qui tam* litigation without the Government's participation. *See* S. Rep. No. 345, 99th Cong., 2d Sess. 27 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5292.

[6] In at least one case, the court has withheld consent. The relator in *Gravitt* v. *General Elec. Co.*, 680 F. Supp. 1162 (S.D. Ohio), *app. dismissed*, 848 F.2d 190 (6th Cir.), *cert. denied*, 488 U.S. 901 (1988), blocked a settlement that the Justice Department had concluded was in the Government's interest. As a result, the Government and the defendant became embroiled in several years of bizarre and unseemly litigation—with the case proceeding under the direction of the *qui tam* plaintiff, who purported to represent the United States even though (a) the Justice Department participated in the case and (b) the plaintiff and Government took conflicting positions on issue after issue, including whether the suit should proceed at all.

whether a settlement proposal is "fair, adequate, and reasonable," *id.*) without providing any *legal* standard for the court to apply. Article III prohibits this vesting in the judiciary of these quintessentially administrative or "public interest" determinations. See *Maryland* v. *United States*, 460 U.S. at 1004 (Rehnquist, J., joined by Burger, C.J., and White, J., dissenting from summary affirmance) (citing sources). Congress has more generally conscripted the federal courts into performing administrative investigative and review functions regarding claims of potential fraud against the Government. The False Claims Act provides that parallel administrative proceedings must allow "the same rights in such proceeding" as in a judicial action and may address identical claims of fraud, as well as "determine a civil money penalty." 31 U.S.C. § 3730(c)(5). Findings of fact and law in such administrative proceedings are binding upon the same parties in actions in district courts. *Id.* The principal difference between the administrative and judicial proceedings is that Article III courts must be open for business to consider allegations by any citizen who chooses to seek the "bounty" held out by the Act.

3. This petition presents an issue of great social and economic importance as well as issues of the most fundamental constitutional import. The scope of the Act is breathtaking, and extends to every agency and cabinet department contractual undertaking with private parties. It also encompasses all governmental grants of aid. The Act thus directly interferes with "every aspect of the Government's work that can be implicated in suit under the False Claims Act. Any Government contract can give rise to a False Claims action. For that reason, every routine decision that an agency makes as a contracting party is now subject to the relator's influence." *Constitutionality of the Qui Tam Provisions of the False Claims*

Act, 13 Op. Off. Legal Counsel 249, 263 (1989) (Assistant Att'y Gen. William P. Barr) (finding Act's provisions unconstitutional). Although many suits have arisen initially in the defense industry, every governmental sector will be subject to the Act as the plaintiffs' *qui tam* bar expands in numbers and interests. And as the Government increasingly uses the contracting process in novel areas, such as health care and welfare reform, the number and significance of *qui tam* suits will increase correspondingly.

The potential for being subject to *qui tam* suits even where, as in this case, the Government has determined that no fraud has occurred, tremendously distorts the governmental contracting process. For government contractors, that threat of suit inherently increases the risk of admitting and rectifying any errors in a contract's performance, because a private plaintiff (even a contractor's own employee) could transform that change in conduct into a baseless but costly *qui tam* suit. Indeed, that potential liability will serve as an additional basis for deterring many of the nation's finest corporations from engaging in work, or in accepting additional work, for the federal government. Certainly the increased costs associated with the litigation will in part be passed on through higher prices, which will most directly affect the federal government.

The potential for suit by private relators correspondingly distorts and disrupts the government's role in the contracting process:

> Any complex contract naturally will produce issues of construction between the parties. In the case of Government contracts, the agency concerned must decide whether contract deviations constitute a breach, and sometimes whether a breach amounts to fraud. In making these decisions, it is frequently in the Government's interest, as it would be in the interest of any contracting party, to avoid excessive

> concern over minor failings that might threaten a useful course of dealing with the other party. In the Government's case, especially, the agency must carefully consider such matters where the contract involves important military or national security matters, particularly if there are a limited number of qualified contractors, or the contractor's performance otherwise has been adequate or even excellent.

Constitutionality of the Qui Tam Provisions of the False Claims Act, supra, at 263-64. In addition, the Contracts Dispute Act ("CDA") provides for the comprehensive resolution of governmental contract disputes and employs the expert U.S. Claims Court, but a mere allegation of fraud through a *qui tam* action disrupts and defeats this scheme by taking advantage of an exception in the CDA and thus vesting jurisdiction instead in any district court to resolve all related contractual claims. See 41 U.S.C. § 605(a); *United States* v. *Rockwell Int'l Corp.,* 795 F. Supp. 1131 (N.D. Ga. 1992) (and cases cited); *Litton Sys., Inc.* v. *United States,* 27 Fed. Cl. 306 (1992).

The harms created by private relator *qui tam* suits where the Government chooses not to intervene might be less severe if offset by corresponding benefits, but those benefits have not emerged. Indeed, the vast majority of private relator suits have proved to be strike suits designed to employ the judicial process to conduct a "fishing expedition." Even though the Government stands to benefit financially from *meritorious* private relator suits, it has credited empirical evidence demonstrating both the lack of utility and burden of such private suits:

> An uncomfortable number of the *qui tam* suits filed present no evidence, no information based on personal knowledge, or are 'kitchen sink' complaints, containing every conceivable broad allegation without any specific evidence whatsoever. . . . Because so many meritless *qui tams* are filed, at least one large Inspector General's office has warned us that it may have to decline to investigate certain *qui tam* suits.

> . . . Moreover, in cases where the Department has declined to pursue the matter, . . . private lawyers have contributed just .001% of the total *qui tam* recoveries to the government in the last six years, and .0002% of the total fraud recoveries.

False Claims Act Technical Amendments of 1992: Hearings on H.R. 4563 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 102d Cong., 2d Sess. 24, 26 (1992) (statement of Stuart M. Gerson, Assistant Att'y Gen., Civil Div., U.S. Dep't of Justice). The Department has further quantified the exceptionally limited benefit of private relator suits, especially in relation to the enormous cost of litigating such suits:

> [O]nly a relatively small dollar amount of the total *qui tam* recoveries ($8.6 million out of approximately $400 million) have occurred in cases where the government did not handle the action but allowed the relator to litigate it. Of the 335 cases where the government has affirmatively declined to proceed, relators have obtained recoveries for the government in only 16 cases. The average government recovery on behalf of the United States in *qui tam* suits is over $6 million; the average relator recovery in cases we decline is about $39,000.

Letter from Frank W. Hunger, Assistant Att'y Gen., Civil Div., U.S. Dep't of Justice, to Sen. Howell Heflin of Sept. 2, 1993, at 3. Assuming conservatively that the cost of defending these cases is approximately $100,000 per case, the defense industry, which is suffering from significant financial problems, spends almost three times more in each *qui tam* case than the Government realistically can expect to receive.

Although such systemic failures of the *qui tam* process and the tremendous social cost imposed by private relator suits might not independently merit this Court's attention, those failures arising out of unquestion-

ably significant constitutional issues presented by the petition in this case do justify certiorari in this case.

CONCLUSION

For the foregoing reasons and those presented in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1993

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Petitioner,

v.

UNITED STATES OF AMERICA,
ex rel. KEVIN G. KELLY,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the rules of this Court, the Washington Legal Foundation respectfully moves for leave to file the attached brief as *amicus curiae* in support of the petitioner. Petitioner has consented to the filing of this brief; however, the respondent has not provided consent.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C. with over 100,000 members and supporters nationwide. WLF devotes a substantial portion of its resources to litigating cases and filing *amicus curiae* briefs in this and other federal courts dealing with separation of powers issues, standing, and similar issues raised in this case. *See, e.g., Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989); *United States*

ex rel. Kreindler & Kreindler v. United Technologies Corporation, 985 F.2d 1148 (2d Cir. 1993).

In addition, WLF programs, including its Legal Studies Division, also address civil justice reform, such as the need to reduce the litigation explosion driven to a large extent by the award of excessive attorneys' fees. The *qui tam* provisions of the False Claims Act also encourage frivolous lawsuits which are not in the public interest.

WLF can bring a broader perspective to this case than that presented by the parties, and believe its participation at this stage of the proceedings will assist the Court in determining whether to grant review.

Accordingly, WLF respectfully requests that it be granted leave to file the annexed brief.

Respectfully submitted,

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Date: January 14, 1994

QUESTION PRESENTED

The Washington Legal Foundation will address the following questions:

1. Does the *qui tam* provisions of the False Claims Act impermissibly infringe upon the Executive Branch's Article II authority by allowing *qui tam* relators to conduct litigation on behalf of the United States, when the United States declines to intervene in the action, and therefore violate the Separation of Powers Doctrine?

2. Does Congress' broad delegation of litigation authority under the *qui tam* provisions of the False Claims Act to an unspecified class of relators who control the initiation and conduct of litigation on behalf of the United States, when the United States declines to intervene in the action, violates the Appointments Clause of the United States Constitution?

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The interest of the Washington Legal Foundation is set out its Motion for Leave to File Brief of *Amicus Curiae* attached hereto.

SUMMARY OF ARGUMENT

1. The legislative history and language of the *qui tam* provisions of the False Claims Act ("FCA") make it clear that Congress sought to infringe upon the primary Executive function of the initiation and conduct of the litigation of government rights, and that Congress' actions are a diffusion of the Appointments Clause. Members of

both Houses of Congress disapproved of the Executive's use of discretion in enforcing the FCA. Accordingly, Congress granted unfettered control of the decision to enforce government rights to private individuals. Further, Congress placed almost no limits on who qualifies as a relator capable of enforcing those rights, bypassing the need for appointment, thus diffusing control over the initiation and conduct of the litigation of government rights.

2. The *qui tam* provisions of the FCA violate the Separation of Powers Doctrine found throughout the Constitution. The powers given to *qui tam* relators divest the Executive Branch of its Constitutional responsibility to initiate and conduct the litigation of government rights. The Executive's lack of control over all aspects of *qui tam* litigation violates the Doctrine by placing such power in self-appointed individuals who lack the credentials to carry out Executive duties.

3. The *qui tam* provisions also violate the Appointments Clause. Art. 2, sec. 2, cl. 2. Under the FCA, *qui tam* relators exercise significant authority and have primary responsibility for initiating and conducting litigation of government rights. As such, the substance of the relator's authority and responsibility qualify them as officers. Notwithstanding their lack of salary, specified term or formal appointment, relators are officers, not lesser functionaries. Further, Congress' broad appointment of relators diffuses the appointment power.

REASONS FOR GRANTING THE WRIT

I. THE LEGISLATIVE HISTORY AND LANGUAGE OF THE *QUI TAM* PROVISIONS SHOW CONGRESSIONAL INFRINGEMENT

The critical inquiry presented by the *qui tam* provisions of the False Claims Act (FCA"), 31 U.S.C. §§ 3729, *et seq.*, asks which department of the federal government possesses *control* over the initiation and conduct of the

litigation of government rights. Under the language of Article II and the Separation of Powers Doctrine, the Constitution places control of these responsibilities solely with the Executive Branch. Further, the Appointments Clause of Article II specifies the manner of appointment of officers of the United States, including those who control the discretion for the initiation and conduct of litigation on behalf of the United States.

Contrary to the Constitution, the FCA permits *qui tam* relators to appoint themselves and then control the enforcement of the FCA in prosecuting fraud claims for the Government. Congress' incursion into the President's zone of control must not be allowed, as it violates both the Separation of Powers Doctrine and the Appointments Clause, thereby threatening the structure of the federal government as set forth in the Constitution.

A. The Legislative History Of The FCA

The legislative history of the 1986 amendments to the FCA clearly expresses Congress' dissatisfaction with the Executive Branch's discretion to initiate and conduct FCA actions. Accordingly, Congress improperly shifted control of these actions from the Executive to a statutory-created class of self-appointed private individuals.

For instance, the Senate Judiciary Committee's Report on the 1986 amendments to the FCA states that their purpose was to boost relator suits to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." *Report on 1986 Amendments to False Claims Act, Senate Judiciary Committee,* S. Rep. No. 99-345, 99th Cong., 2d Sess. 24 (1986) (1986) *reprinted in* 1986 U.S.C.C.A.N. 5266 [hereinafter "Senate Report"]. The Committee's intent with the amendments was to "encourage more private enforcement suits." Senate Report at 23-24. The Committee gave individuals enforcement power to counter lack of confidence in "the Government's ability to remedy [fraud]," *id.* at 25, and to act "as a check" on the

Executive's unacceptable exercise of discretion in not pursuing fraud. *Id.* at 25-26.

More telling of legislative arrogation are the statements of Senator Charles Grassley, one of the principal sponsors of the 1986 amendments. Senator Grassley, in introducing the amendments, stated that in "too many cases" the Government "was not willing to adequately protect" the public fisc. 131 Cong. Rec. 22,322 (1985). The Senator questioned why the "Government bureaucracy [was] unwilling to guard against or aggressively punish fraud." *Id.*

Similar sentiment was expressed in the House of Representatives. House co-sponsor Congressman Bedell stated that the Executive Branch was not interested in prosecuting fraud "for political reasons." 132 Cong. Rec. H6483 (daily ed. Sept. 9, 1986). Congressman Berman, another co-sponsor, bluntly campaigned for removal of Executive control over FCA suits to "ensure that the case is effectively prosecuted on its merits." 132 Cong. Rec. H6474-02 (daily ed. Sept. 9, 1986). The Congressman suggested that the Justice Department "has not done an acceptable job of prosecuting defense contractor fraud." *Id.* Congressman Berman advocated passage of the amendments to remove Executive influence and directly "deputize ready and able people who have knowledge of fraud against the government." 132 Cong. Rec. H9382-03 (daily ed. Oct. 7, 1986). Thus, Congress's intent in amending the FCA was to seize control of the Executive's power to initiate and conduct litigation and shift these responsibilities to private individuals.[1]

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[1] Courts examining *qui tam* actions have recognized that private participation in enforcement actions is unlawful if it is a "subterfuge for Congressional control." *See United States ex rel. Truong v. Northrop Corp.*, 728 F. Supp. 615 (C.D. Cal. 1989); *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1095 (C.D. Cal. 1989).

What is significant in these statements is the absence of any implication that the Executive was unable to adequately enforce the FCA and that "help" was needed. Rather, the amendments plainly were the product of the Legislative Branch's discontent with the Executive Branch's exercise of its discretion to initiate and conduct litigation under the FCA.

B. The Language Of The *Qui Tam* Provisions Of The FCA

The language of the *qui tam* provisions clearly express Congressional intent to strip the Executive Branch's authority to initiate and conduct FCA actions. Under the *qui tam* provisions of the FCA, private individuals are authorized to "bring a civil action for a violation of [the Act] for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). The complaint is served on the government, but not the defendant, and remains sealed for sixty days while the government investigates the case to determine whether to intervene. *Id.* § 3730(b)(2). If the government elects to proceed with the litigation, it has "the primary responsibility for prosecuting the action"; however, the relator remains a party, and is entitled to request a hearing to challenge a government decision to dismiss or settle a case. *See id.* § 3730(c).[2]

However, when the government declines to intervene the FCA expressly provides that the *relator* "shall have the right to conduct the action." *Id.* § 3730(c)(3). While the government retains the right to seek intervention at a later point in the litigation, it may do so only upon a showing of good cause, and the government cannot "limit the status and rights of the relator." *Id.* This provision effectively

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[2] Thus, even when the Executive intervenes in a *qui tam* action, its ability to settle or dismiss a case is severely curtailed. *See, e.g., Gravitt v. General Elec. Co.*, 680 F. Supp. 1162 (S.D. Ohio), *appeal dismissed mem.*, 848 F.2d 190 (6th Cir.), *cert. denied*, 488 U.S. 901 (1988) (permitting successful relator to challenge settlement reached between government and defendant) (discussed more fully *infra*).

denies the Executive the power to dismiss an action, because dismissal would limit the relator's status and rights. Moreover, it also denies the government the right to intervene later to control the action.

Finally, the *qui tam* process places few limitations on those who may be relators. 31 U.S.C. § 3730(b)(1) permits "a person" to bring a *qui tam* action under the FCA. The term "person" is interpreted broadly, including even business and governmental entities. Senate Report at 8 (citations omitted).

II. THE FCA'S DEPRIVATION OF EXECUTIVE CONTROL OF THE INITIATION AND CONDUCT OF LITIGATION OF GOVERNMENT RIGHTS VIOLATES THE SEPARATION OF POWERS DOCTRINE

A. Separation Of Powers

The Separation of Powers Doctrine distributes power among the three branches of government to "protect the liberty and security of the governed." *Metropolitan Washington Airports Auth. v. Citizens For The Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2310 (1991). Although not specifically enumerated in the Constitution, the doctrine is recognized implicitly by the organization of the first three Articles and their vesting clauses. The separation of powers among the coordinate branches of government is not absolute: a system of checks and balances exists to prevent tyranny, establish an effective government, and preclude the encroachment or arrogation of one branch by another. *Buckley v. Valeo*, 424 U.S. 1, 121 (1976); *see also Mistretta v. United States*, 488 U.S. 361, 381-82 (1989).

Separation of Powers, shared through a checks and balances scheme, clearly contemplates three fundamental principles regarding the function of each coordinate branch. First, certain primary constitutional functions exist that are essential to the nature and operation of a particular

branch: A branch may not delegate such functions to another nor may another interfere with, or supervise, those functions. Second, in addition to its primary constitutional functions, each branch may exercise functions that encroach on the functions of other branches *if* such incursions are *mandated expressly* by the system of checks and balances. Third, each branch may exercise functions that encroach on the functions of other branches *if* these functions are necessary and incidental to the exercise of its primary constitutional function, and, of course, do not interfere with another branch's primary Constitutional function. *Buckley*, *supra* at 121-22 (citing and quoting *Hampton & Co. v. United States*, 276 U.S. 394 (1928)). Thus, Congress is given the responsibility to create laws, and the President cannot perform these primary legislative functions. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Similarly, the President is given the responsibility to enforce the laws or appoint agents charged with the enforcement of laws, and Congress cannot perform these primary executive functions. *Buckley, supra* at 123-24; *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928).

B. Enforcement Of Government Rights Is A Primary Executive Function

Under the Separation of Powers Doctrine, the duty to prosecute violations of government rights is placed with the Executive. This duty is absolute and represents one of the Executive's primary constitutional functions. Thus, *any* divestiture of this duty from the Executive violates the Doctrine and is unconstitutional.

The Constitution specifically dictates that the Executive, not Congress, has the responsibility to "take Care that the Laws be faithfully executed . . . ." U.S. Const., Art. II, sec. 3; *Buckley*, *supra* at 138. The prosecution of cases to enforce government rights is, and always has been, a primary executive function. *United States v. Nixon*, 418 U.S. 683, 693 (1974). ("[T]he Executive Branch has exclusive authority and absolute discretion to decide

whether to prosecute a case . . . .") Transfer of the law enforcement power from the Executive to another entity is an unconstitutional invasion of the Executive's primary constitutional function. *See Springer*, *supra* at 202. *See also Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (power *not* to prosecute or enforce laws is integral part of executive constitutional duty to "take Care that the Laws be faithfully executed").[3]

The demands of operating a modern government necessitate that law enforcement be diffused within the Executive Branch. For example, Executive agencies often perform administrative enforcement. However, the Executive Branch retains control over civil and criminal enforcement.[4] All "formal" Executive administrative agencies defer to the responsibility of the Attorney General and the Justice Department to conduct the litigation on behalf of the United States. Generally, even "independent" agencies are represented in court by the Justice Department. *See, e.g., Interstate Commerce Commission v. Southern Railway Co.*, 543 F.2d 534, 536-37 and n.2 (5th Cir. 1976). In those rare instances when an independent" agency brings suit in its own name, the Executive retains control over the enforcement of government interests through the selection of high-level

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[3] The "national fundamental law" inherent in the constitutional scheme mandates that the Executive possess the exclusive authority to decide whether to prosecute a case. Only the Executive can balance competing state interests, national security interests, and the interest for the just administration of the laws.

[4] By statute, unless otherwise authorized by law, all litigation in which the United States, an agency, or officer of the United States is a party is conducted and supervised by the Attorney General and the Department of Justice. 28 U.S.C. §§ 516, 519. *See United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458 (1869). In *Morrison v. Olson*, 478 U.S. 654 (1988), the most attenuated diffusion of Executive power approved by this Court, the decision to initiate and conduct litigation belonged absolutely with the Attorney General. *Morrison*, *supra* at 196.

agency personnel, the introduction of legislation, and the ability to reorganize the government.[5]

Independent counsel statutes such as the Ethics in Government Act ("EGA"), 28 U.S.C. §§ 591 *et seq.*, do not divest the Executive of control of the litigation and conduct of government rights. In *Morrison v. Olson*, 487 U.S. 654 (1988), this Court concluded that the EGA provisions for designating an independent counsel did not violate the Separation of Powers Doctrine as embodied in the Appointments Clause because of the control retained by the Executive.[6] The *Morrison* Court held that the Executive's power to remove the counsel, the power to initiate the appointment, or the requirement that the counsel abide by Justice Department policies established sufficient Executive control over the enforcement of government rights.[7]

---

[5] *See Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

[6] It is plain from this Court's discussion in *Morrison* that to comply with the strictures of Article II there must be indicia of both appointment and control. Moreover, to the extent that the indicia for either is weak, the other must be correspondingly strong. In cases where the Attorney General declines to intervene, it is clear that no appointment occurs. When this fatal flaw is coupled with virtually non-existent indicia of control, the relator can meet no conceivable construction of *Morrison*.

[7] Overturning the *qui tam* provisions will not impact private attorney general statutes created by Congress for environmental and other types of litigation. In contrast to the *qui tam* provisions, these statutes vindicate private and *incidental* government rights. They do not divest the initiation and conduct of litigation of government rights from the Executive. Private attorney generals must show personal injury, not injury to the government, to establish standing. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2137-38 (1992). Once the plaintiffs have advanced a sufficient interest to establish standing, they may assert the interest of the general public in support of their own equitable relief claims.

Nor will this Court's action on the *qui tam* provisions affect statutes which provide a bounty to private individuals who report fraud to the government. *See, e.g.*, 26 U.S.C. § 7623 (providing discretion

(continued...)

Finally, minor historical incidents cannot be used to refute the Executive's responsibility to retain *complete* control over the litigation and conduct of litigation of government rights. The Ninth Circuit has noted that prosecutorial functions need not *always* be undertaken by Executive Branch officials by examining the historical duties performed by prosecutors in the Constitution's early years. *See United States ex rel. Kelly v. Boeing*, ____ F.3d ____, (1993), Pet. App. 15a-16a. This narrow approach places too much reliance on rarely invoked early law enforcement practices.

In fact, prosecution in the Federalist period was almost always performed by executive officials. *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel 249 (available on Lexis as 1989 *OLC LEXIS* 25, *69-*71).[8] The rare instances in which non-Executive officials conducted prosecution must be examined in the context of the time period. In the late 1700's, application of the Separation of Powers Doctrine and the checks and balances scheme was relatively new and subject to much initial confusion. These factors explain why "non-executive law enforcement functions would not have been immediately apparent," because it "did not bite hard enough for the Executive to recognize or resist it as an usurpation of its authority." *Id.* at *68. The change from a Monarchy to a Constitution caused many problems with the incorporation of English laws, institutions, and

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[7] (...continued)
to pay rewards to those reporting violations of tax laws). It is the government in such cases which determines whether the case has merits, determines the value of the information, enforces the laws, and chooses whether and how much to pay the private informer.

[8] The Office of Legal Counsel's opinion is a lengthy and well-reasoned opinion on the unconstitutionality of the FCA. It is no credit to the Attorney General's obligation of legal objectivity that he(she) has refused thus far, for plainly political reasons, to participate actively in any constitutional appeal of the FCA.

ideas.[9] Thus, minor historical variances do not negate the Executive's responsibility to retain *complete* control over the enforcement and prosecution of government rights.[10]

The *qui tam* provisions of the FCA are unconstitutional because they take a primary Executive function, initiating and conducting the litigation of government rights, away from the Executive Branch. The FCA allows Congress to withdraw power from a co-equal branch and assign that power to an entity with an artificial interest in the litigation. This arrogation and dilution of Executive authority violates the Doctrine and removes Government accountability for the enforcement of laws. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804-05 (1987); *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2638 (1991). Indeed, without authority to appoint or dismiss the relator, the Executive is prevented from accomplishing its constitutional function of prosecuting breaches of the law. *Nixon v. General Services Administration*, 433 U.S. 425, 443 (1977).

C. Even If The Enforcement Of Government Rights Is Not A Primary Executive Function, The FCA Is Unconstitutional

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[9] The Office of Legal Counsel's opinion presents federal criminal law as an example of early conduct regarding the implementation of the Constitution. "For the first six years after the Constitution was adopted, virtually all persons who considered the issue believed that the Constitution permitted a federal common law of crimes. . . . [People soon began] to appreciate that the federal common law of crimes was inconsistent with the new Constitution's vesting of the legislative power solely in Congress . . . . [The] exclusive vestings of power [in the Executive and Legislative] were innovations introduced by the Constitution, the full implications of which were only slowly perceived." 13 Op. Off. Legal Counsel 249 at n.19.

[10] The existence of *qui tam* statutes during the Federalist period cannot rescue the FCA from its constitutional defects. Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

Even if a determination is made that control of the Enforcement of government rights is not a primary Executive function, the *qui tam* provisions of the FCA still violate the Separation of Powers Doctrine by encroaching on the Executive's ability to conduct its Constitutionally assigned functions. In *Morrison v. Olson*, this Court advanced factors to consider when determining whether legislation which encroaches on the Executive's power is nonetheless incidental and necessary to the operation of legislative functions. This Court concluded that the EGA did not violate the Separation of Powers Doctrine, establishing indicia of control that permitted the appointment of the independent counsel to survive Article II scrutiny. These indicia of control are the Constitutional minima required by *Morrison* and the Doctrine. 487 U.S. at 696.[11]

In FCA actions where the Government declines to intervene, the Executive's power is most threatened with divestiture. For example, the Executive has absolutely no control over the initiation of the action. Control over the decision to sue or not to sue is one of the most fundamental powers a law enforcement authority possesses. *Heckler, supra* at 831. Allowing the *qui tam* relator to file suit without the permission or endorsement of the Executive Branch denies the Executive this primary enforcement power. Even if the Executive determines that a case is meritless or that it would prefer resolution

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[11] Justice Ginsburg, then Judge in the D.C. Circuit Court of Appeals, held that the EGA was constitutional because it did not transfer "an executive function to another branch nor order[ ] an undue displacement of executive prerogatives." *In re Sealed Case*, 838 F.2d 476, 518 (D.C. Cir. 1988) (Ginsburg, J. dissenting). The dissent carefully detailed how the Attorney General's ability to *control* prosecution through the appointment, supervision, and removal of the Independent Counsel allowed the EGA to pass constitutional muster under a separation of powers analysis advanced by either *Bowsher v. Synar*, 478 U.S. 714 (1986) or *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986). Under the FCA, the Executive possesses none of the controls enunciated in *Morrison*.

without litigation, it is stripped of its ability to prevent the litigation from going forward. This stands in direct contrast to the statute at issue in *Morrison* which vests the authority for initiating litigation with the Attorney General.

Further, once the litigation is underway, the United States has no right whatsoever to control the relator's conduct of the case. Whereas the Attorney General under the EGA has the power to determine the scope of the Independent Counsel's jurisdiction, the government retains no such authority under the FCA. Nor does the FCA require, as does the EGA, that *qui tam* relators follow Department of Justice policies. The relator has absolutely no obligation to take into account the policies and concerns of the United States Government, and the government has no ability to impose its will on the relator. Moreover, in *Morrison*, this Court identified the power to remove an independent counsel as the most important control retained by the Attorney General. The FCA makes no such provision for removal of a relator. In fact, the thrust of the FCA is to guarantee the relator's participation regardless of the government's intervention. Consequently, *qui tam* relators are in no way held accountable to any official in the Executive Branch regarding the conduct of the litigation.

When the Government declines to intervene, it effectively loses its power to terminate the litigation. Although the Government may move to intervene later for good cause, the court is not required to allow intervention. *See* 31 U.S.C. § 3730(c)(3). The Government's intervention, if allowed at all, also must not limit the "status and rights" of the relator. *Id.*[12] The FCA effectively denies the Executive the primary power to

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[12] Under 31 U.S.C. § 3730(c)(3), the government does not possess *any* right to dismiss the case over a relator's objection. The FCA only allows the government the right to dismiss a case in 31 U.S.C. § 3730(c)(2)(A), not subsection (c)(3); 31 U.S.C. § 3730(c)(2) *assumes* that the government has intervened under 31 U.S.C. § 3730(b)(2) to prosecute the case alongside the relator.

resolve or dismiss a case purportedly brought on behalf of the United States.[13]

Thus, the *qui tam* provisions of the FCA are unconstitutional because the Executive fails to retain the level of control over the initiation and conduct of the litigation of government rights as required by *Morrison*. This dilution of Executive control is impermissible under the Separation of Powers Doctrine.

III. THE *QUI TAM* PROVISIONS VIOLATE THE APPOINTMENTS CLAUSE OF ARTICLE II

The Appointments Clause, Art. II, sec. 2, cl. 2[14] limits the government in two ways: it protects against the arrogation of one branch's power by another, and it prevents the diffusion of the appointment power. *Freytag*, *supra* at 2638.[15] Further, this Court has always strictly

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[13] This limitation on the government's ability to settle an action is illustrated most forcefully in *Gravitt*, *supra n.2*, in which the Government chose to intervene later in the action to settle the litigation with the defendant. The relator, however, was able to block that settlement. The case continued for several years with the relator and the Government often disagreeing on litigation strategy. Given the *Gravitt* court's restrictions on the Government's authority to dismiss or settle cases in which it has intervened, it is reasonable to assume that the Government has no right at all to resolve a case in which it has not intervened.

[14] The clause states "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

[15] Unlike *Freytag*, which dealt with arrogation of the appointment power by a third party within government, this case involves arrogation of government power by private parties.

construed such explicit grants of power. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 485-88 (1989) (Kennedy, J., concurring).

Relators are not appointed in the manner prescribed by the Appointments Clause. If relators act as officers they must be so appointed. Construed strictly, the *qui tam* provisions of the FCA violate the explicit language and principles of the Clause, allowing the appointment of an unlimited number of officers, known as relators, to initiate and conduct litigation on behalf of the government.

A. Relators Act As Officers In Violation Of The Appointments Clause

In *Buckley*, this Court analyzed the provisions of the Federal Election Campaign Act, which empowered a federal commission to perform investigative, rulemaking and enforcement tasks. The *Buckley* Court stated that those exercising "significant authority" under federal law are "officers" under the Clause. 424 U.S. at 126. The *Buckley* Court found that the investigative and rulemaking powers granted to the commission by Congress were merely an aid of the legislative function, and thus comported with the Appointments Clause. However, the Court held that the enforcement provisions were constitutionally infirm because they granted Article II enforcement powers to an Article I entity. The Court reasoned:

> The Commission's enforcement power, *exemplified by its discretionary power to seek judicial relief*, is authority that cannot possibly be regarded as merely an aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed."

Buckley, 424 U.S. at 138 (emphasis added). Therefore, the Court concluded:

> [T]hese provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Art. II, § 2, cl. 2, of the Constitution. Such functions may be discharged only by persons who are "Officers of the United States" within the language of that section.

Buckley, *supra* at 140.[16] *See also United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888) (Attorney General is officer in charge of the conduct of litigation "necessary to establish the rights of the Government"); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-459 (1869).

In the context of litigating government rights, the requirement for one to exercise "significant authority" to constitute an Appointments Clause violation does not arise in the maintenance or resolution of a suit. The key to Appointments Clause analysis in this context is determining whether an individual has the "discretionary power to seek judicial relief;" that is, does one have control over the *initiation* of litigation. The *qui tam* relator clearly has such control. It is the relator who decides to sue, which district court to sue in and what theories to sue on. As for *Buckley's* "primary responsibility" requirement, when the Government does not intervene, as in the instant case, the relator is the only party responsible for enforcing government rights. The relator is answerable to no one,

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[16] In *Morrison v. Olson* (discussed *supra*), 487 U.S. at 680-81, this Court acknowledged *Buckley* and concluded without discussion that the independent counsel appointed under the provisions of the EGA is an officer of the United States because the counsel is "not subject to the control or direction of any other executive, judicial, or legislative authority." *Buckley*, 424 U.S. at 126 n.162. These cases make it clear that individuals empowered to conduct litigation on behalf of the United States are officers subject to the Appointments Clause.

and is able to conduct litigation without Executive Branch control.[17]

The Ninth Circuit's *Boeing* decision ignores the relator's ability to control the litigation and instead makes two arguments: the relator's responsibility is limited to one case; and the court can limit the relator's actions.[18] *Boeing*, Pet. App. at 31a. However, limiting a prosecutor to one case is not dispositive. If so, the independent prosecutor in *Morrison* would not be an officer. Also, the court limitation of the relator, upon the motion of the government or the defendant, only applies *when the government intervenes* under 31 U.S.C. § 3730(b)(2), not when government intervention occurs under 31 U.S.C. § 3730(c). In the latter case, the court has no authority whatsoever to limit the relator's actions.

B. Relators Are Not Lesser Functionaries

The Ninth Circuit commented with approval on the district court's observation that the relators received no federal salary, no specified term, and are not appointed by Congress. Thus, relators are not officers, but lesser functionaries, [19] *Boeing,* Pet. App. at 31a (citing *Auffmordt*

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[17] However, unlike the EGA, here, the relator exercises *no* realistic independent discretion: he is motivated only to sue. He has not been "retained" as an independent prosecutor to make an objective judgment.

[18] Court imposition of its authority under the FCA does *not* alter the requirement for an officer to be appointed pursuant to the clause.

[19] In considering whether relators are officers or lesser functionaries, it is worth noting Justice Scalia's warning:

> If the mere fragmentation of executive responsibilities into small compartments suffices to render the heads of each of those compartments inferior officers, then Congress could deprive the President of the right to appoint his chief law enforcement officer by dividing

(continued...)

v. Hedden, 137 U.S. 310, 327 (1890)). However, it is necessary to look at the substance of the relator's authority, and not the form of the relator's position. The relator has absolute discretion to initiate and prosecute litigation of government rights.[20] In addition, the relator receives a statutory bounty when the case is successfully concluded as compensation for his actions. Finally, lack of Congressional appointment certainly does not prove that relators are not officers. Congress cannot appoint officers. *Buckley*, *supra* at 139 (quoting *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928)). Had Congress appointed relators in a traditional fashion, it clearly would have run afoul of the Constitution. Instead, Congress chose to allow relators to appoint themselves. This subterfuge cannot be sanctioned: "[w]hat cannot be done directly . . . cannot be accomplished indirectly by legislation which accomplishes the same result." *Fairbank v. United States*, 181 U.S. 283, 294 (1901) (and cases cited therein).

Lesser functionaries such as agents or employees exist in contrast to appointed officers. Agents are those authorized by another to act on his behalf and subject to his control. Restatement (Second) of Agency § 1 & cmt. e (1958); 2A C.J.S. Agency § 4. As commonly understood, an agent is one who, having no personal interest in the subject matter of his agency, acts for another, and does not profit from his activities except as to such compensation he may receive from his principal,

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[19] (...continued)
up the Attorney General's responsibilities among a number of "lesser" *functionaries*.

Morrison, 487 U.S. 654, 718 (1988) (Scalia, J., dissenting). This division of responsibilities has happened without a formal appointment. Whether the Attorney General approves of such diminution of authority is unimportant; it is unconstitutional.

[20] This is true even when, after investigation under § 3730(b)(2)-(4), the government has concluded that the relator's charges are without merit.

independently of the venture to which his agency relates." 2A C.J.S. Agency § 4. Furthermore, there can be no agency relationship unless the principal has some right of control over the actions of the agent. *Id.* at § 6. Finally, if there is a conflicting interest, the agent must subordinate his interests to those of the principal.

Relators cannot be agents of the Executive Branch. Neither the President nor the Attorney General has authorized them to act on behalf of the Executive. Relators have a personal, pecuniary interest in the enforcement of the FCA. Relators have exclusive control over the initiation and course of their "agency". Finally, relators can and often do place their interests in enforcing the FCA over those of the Executive.

C. The Lack Of Limitations On Who May Be A Relator Impermissibly Diffuses The Appointments Clause

As the Fourth Circuit noted, "Congress has let loose a posse of *ad hoc* deputies to uncover and prosecute frauds against the government." *United States ex rel. Milam v. University of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992) (Eleventh Amendment immunity was denied to state agency because the United States is the real party in interest in FCA *qui tam* actions). Such a grant of prosecutorial authority to an indeterminate class impermissibly diffuses the Executive's prosecutorial powers. In fact, the more widely its authority is distributed, the more diffuse becomes the Executive's ability to oversee and control those cases purportedly brought on behalf of the United States. The result is that which the Appointments Clause was intended to prevent. *Freytag*, 111 S. Ct. at 2638.

CONCLUSION

For the foregoing reasons, the Boeing Company's petition for writ of certiorari should be granted.

Respectfully submitted,

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v.

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE BLUE CROSS AND BLUE SHIELD ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF THE BLUE CROSS AND BLUE SHIELD ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the rules of this Court, the Blue Cross and Blue Shield Association (the "Association" or "BCBSA") respectfully moves for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari. Petitioners have consented to the filing of this brief. This motion is made necessary by the refusal of respondent's counsel to provide consent.

BCBSA is a not-for-profit corporation organized under the laws of Illinois with its principal place of

business in Chicago. BCBSA functions as owner and licensor of the Blue Cross and Blue Shield service marks, monitors compliance with licensing agreements, and provides a variety of support services to its Member Plans. These services include representing the interests of its Member Blue Cross and Blue Shield ("BCBS") Plans before Congress and in the courts, providing Member Plans with research, actuarial, marketing, and other services, and coordinating public education and professional relations programs.

The Member Plans of BCBSA are 69 separate and autonomous not-for-profit health insurance companies located throughout the United States. The Plans are licensed to use the registered Blue Cross and Blue Shield service marks in designated service areas, many of which are statewide. BCBS Member Plans issue health benefit policies to individuals as well as groups. BCBS Plans enter into a variety of insurance and administrative-service contracts with employers and employer group health plans that provide a range of prepaid health care benefits. BCBS Plans provide or administer private health care benefits covering millions of Americans.

The Association also contracts with the Health Care Financing Administration ("HCFA"), an agency of the Department of Health and Human Services, to act as an administrator of Part A of Medicare, with 40 BCBS Plans as its subcontractors. Twenty-three BCBS Plans contract directly with HCFA as administrators of Part B of the Medicare program. Pursuant to these contracts, the BCBS Plans act as fiscal intermediaries and carriers between hospitals, physicians, and other providers and the HCFA,

and, as such, process Medicare claims for the Government.

BCBSA and its Member Plans have a strong interest in the outcome of this case. BCBS Member Plans have been sued in a number of *qui tam* actions to date. BCBS Plans have found themselves as *qui tam* defendants in one of at least two ways. *First*, as government contractors under the Medicare program, BCBS Plans have been sued for allegedly making "false claims" on the Government when they have erroneously paid Medicare claims. *Second*, in their capacity as private insurers or administrators, BCBS Plans have been sued for "false claims" where HCFA has made mistaken Medicare payments in circumstances in which federal law provides that Medicare coverage is secondary to that of private insurance. *See* 42 U.S.C. § 1395b (Medicare as Secondary Payer statute). As *qui tam* litigation in the health care industry becomes increasingly prevalent, BCBS Member Plans are likely to face a greater number of such lawsuits in the future.

Because of its nationwide scope and the private/public roles of its Member Plans, BCBSA is in a unique position to aid this Court in its understanding of the practical effect of *qui tam* litigation on the health care industry in general, and to illuminate and illustrate the specific practical consequences of the constitutional deficiencies identified by petitioners. Thus, the participation of BCBSA as *amicus curiae* will facilitate this Court's understanding of the importance of the constitutional issues raised and the need for this Court's review of those issues.

Accordingly, BCBSA respectfully requests that its motion for leave to file an *amicus curiae* brief in support of the petition for a writ of certiorari be granted.

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BRIEF OF THE BLUE CROSS AND BLUE SHIELD ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The interest of the *amicus* is set forth in the motion accompanying this brief.

SUMMARY OF THE ARGUMENT

The Blue Cross and Blue Shield Association ("BCBSA") supports and adopts petitioner's views on the

constitutional infirmities of the *qui tam* provisions of the False Claims Act. *See* Pet. at 6-23. In this *amicus curiae* brief, BCBSA demonstrates how the experiences of its Member Plans and other health insurers illustrate these constitutional deficiencies on an immediate and practical level. BCBSA further demonstrates that the unconstitutional *qui tam* provisions have already had a significant adverse impact not only upon health insurers but upon the entire health care industry. Given the expanding federal involvement in the health care field, the fact that the federal government already spends more than $130 billion annually on health care, the ambiguities in interpreting and applying many complex federal regulations concerning health care, and the growing awareness of the *qui tam* device among the legal community, it is clear that *qui tam* will in the future place an even greater burden on the health care industry and on the general public which must pay for health care. The substantial constitutional questions regarding *qui tam* therefore merit this Court's immediate review.

REASONS FOR GRANTING THE WRIT

I. THE EXPERIENCES OF BCBS MEMBER PLANS AND OTHER HEALTH INSURERS ILLUSTRATE THE CONSTITUTIONAL DEFICIENCIES OF THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT

The heavily regulated health care field, which now amounts to approximately 14 percent of gross domestic

product,[1] provides ample opportunities for creative relators, unconstrained by Article III standing requirements, to allege that insurers have made "false claims" on the Government. In the past five years, for instance, a single law firm, Stinson, Lyons, Gerlin & Bustamante ("Stinson Lyons"), has filed separate *qui tam* actions against six different health insurers, including two BCBS Member Plans.[2] Each case involved similar allegations that the defendant had adopted claims-paying procedures under

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[1] The Congressional Budget Office has reported that national health expenditures totalled $751.8 billion, or 13.2 percent of gross domestic product in 1991, projecting that such expenditures will reach 17 percent of the gross domestic product by 1997. Congressional Budget Office, *Controlling the Rate of Growth of Private Health Insurance Premiums*, 1 (Sept. 1993).

[2] Five of these actions were brought by Stinson Lyons itself as relator. *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 736 F. Supp. 614 (D.N.J. 1990), *aff'd*, 944 F.2d 1149 (3d Cir. 1991); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia, Inc.*, 755 F. Supp. 1040 (S.D. Ga. 1990); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia, Inc.*, 755 F. Supp. 1055 (S.D. Ga. 1990); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Pilot Life Ins. Co.*, No. C-90-29-G (M.D.N.C. Jan. 22, 1992); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life and Accident Ins. Co.*, No. CIV-1-89-331 (E.D. Tenn. Dec. 10, 1991); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Pan American Life Ins. Co.*, No. 90-411, 1992 WL 125329 (E.D. La. May 22, 1992). In the sixth action, Stinson Lyons served as counsel for the nominal relator. *See United States ex rel. Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, No. 90-1945-CIV-HIGH-SMITH (S.D. Fla. Aug. 26, 1992), *appeal pending*, No. 92-4875 (11th Cir. argued June 2, 1993).

which it would pay claims of Medicare eligible participants on a secondary basis, even where it was obligated by federal law to pay primary to Medicare. Stinson Lyons claimed that these alleged procedures resulted in "false claims" on the Government.

The United States declined to intervene in any of the six actions. All of the actions were ultimately dismissed with prejudice and none led to a penny's worth of recovery for the Government. As one court observed in its order of dismissal, the facts proffered to substantiate the "allegedly fraudulent 'schemes' constitute, at most, bureaucratic error or mistake."[3]

Meritless lawsuits, of course, are not unique to *qui tam* litigation. *Qui tam* litigation, however, is particularly susceptible to abuse because the relator need not have suffered an injury-in-fact in order to bring suit. Thus, an uninjured relator like Stinson Lyons may seize upon an arguable bureaucratic error or mistake as evidence of fraud and then seek to vindicate its theory through widespread litigation, hoping that civil discovery will reveal that *some* defendant has injured the Government through fraudulent practices. As one court stated, "[w]hat Stinson Lyons is attempting to do here is analogous to describing the elements of a crime (vehicular manslaughter, for example) and then picking a citizen at random, and charging him with the crime."[4]

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[3] *United States ex rel. Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, No. 90-1945-CIV-HIGHSMITH at 11.

[4] *Blue Cross Blue Shield of Georgia, Inc.*, 755 F. Supp. at 1052. As former Attorney General William P. Barr has correctly observed, one of the dangers of *qui tam* is that it will "undermine the liberties of the American people" by circumventing an

The costs of defending *qui tam* actions can be substantial, even where the actions are dismissed before trial. To avoid such costs, *qui tam* defendants will often agree to settle with the relator. These settlements, however, do not necessarily provide any benefit to the United States. For example, in the Stinson Lyons *qui tam* litigation against Provident Life and Accident Insurance Company ("Provident"), the parties reached a settlement while the case was on appeal from the district court's dismissal of the action. The settlement agreement provided that Provident would pay a portion of Stinson Lyons' costs and attorneys fees, but it provided for no award of damages or penalties (and hence no financial benefit to the Government).

The United States objected to this settlement, contending that it was entitled to at least 70% of the proceeds of any recovery or settlement paid to the relator pursuant to the *qui tam* provisions of the False Claims Act. *See* 31 U.S.C. § 3730(d)(2). The court, however, overruled the objection, holding that the Government had no right to object because it had declined to intervene in the action.[5] This decision illustrates the Government's lack of control over the relator once it initially declines to intervene and demonstrates the potential for abuse where private parties with their own agendas exercise executive law

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enforcement structure "designed to protect the people from the improvident or tyrannical enforcement of the laws." *See Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel 249, 253 (1989).

[5] *Provident Life and Accident Ins. Co.*, No. CIV-1-89-331 at 3 (E.D. Tenn. Jun. 25, 1992).

enforcement authority.[6] Provident's decision to settle in this case also shows that a party with a strong legal defense may nonetheless settle simply to avoid the cost and uncertainty of litigating in a complex regulatory environment.

As this Court well knows, the detail and complexity of federal regulation in the Medicare, Medicaid, and other health care fields often makes it difficult to determine what conduct is or is not permitted. Therefore, it is particularly important that the Attorney General exercise discretion in deciding whether to charge a party with fraud. This power to decide whether and how to enforce the law is a core power of the executive branch, which may be exercised only by a properly appointed Government officer. *Qui tam*, however, "effectively strips this power away from the Executive and vests it in private individuals, depriving the Executive of sufficient supervision and control over the exercise of these sovereign powers."[7]

Even when the United States chooses to intervene, the relator retains a substantial ability to interfere with the exercise of executive authority.[8] The statute restricts, for instance, the Government's ability to settle or dismiss a case if the relator objects. *See* 31 U.S.C. § 3730(c). This

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[6] It is not unusual for relators to structure settlements in such a way as to avoid sharing the recovery with the Government. *See DOJ Objects to Whistleblower Settlements*, The DOJ Alert, July 1992, at 7-8.

[7] *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel at 252.

[8] *See generally id.* at 273.

essentially allows the relator to conduct a mini-trial on the issue of the Government's exercise of its litigative discretion.

For example, in a pending *qui tam* action against Blue Cross and Blue Shield of Florida, Inc. ("BCBSF"), the relator has objected to a settlement reached between the Government and BCBSF after eight months of arm's length negotiation.[9] The relator's objections specifically put at issue (1) the Government's analysis of both the facts and the law underlying the claim; (2) the Government's evaluation of the likely recovery versus the cost of litigation and the administrative burden it would place on the Medicare program; and (3) the Government's evaluation of the settlement's effect on public confidence in the integrity of the Medicare program.[10] Such objections attack the very heart of the Attorney General's decision-making and "raise[] the specter of disruption of the tripartite balance of government by undermining the executive branch's litigative discretion." *United States ex*

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[9] Relator's Memorandum in Opposition to United States' Motion to Approve Settlement Notwithstanding Relator's Objections in *United States ex rel. Burr v. Blue Cross and Blue Shield of Florida, Inc.*, No. 91-134-Civ-J-16 (M.D. Fla. filed Oct. 15, 1993). The *Burr* case involves allegations that BCBSF, as administrator of Part B of the Medicare program in Florida, improperly supervised the transition from one computer subcontractor to another and thus was responsible for the Government paying a higher level of erroneous claims submitted by physicians, suppliers and beneficiaries.

[10] *Id.* at 12-17.

rel. Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1093 (C.D. Cal. 1989).[11]

Furthermore, the relator sought discovery in aid of her objections to the settlement. The Government vigorously opposed such discovery, arguing that the relator should not be permitted "to force the United States to engage in costly and time-consuming satellite litigation over the settlement."[12] The Government also pointed out that the "relator's goal is to stymie the proposed settlement by attempting to invade work product immunity, attorney-client privilege, and deliberative process protection in an effort to put the United States Government on trial."[13] Nonetheless, the U.S. Magistrate granted the relator's request to take discovery, and the district court affirmed, holding that the relator was entitled to "limited discovery directed at determining the fairness, adequacy and reasonableness of the proposed settlement."[14]

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[11] As if to highlight the separation of powers concerns here, the relator in *Burr* submitted to the district court, in support of her objections to the settlement, a congressional press release and statement praising her "principled stance" in opposing the settlement. *Id.* at 17 and Ex. 9.

[12] United States' Objections to Discovery Order Dated November 9, 1993, at 5, in *Burr*, No. 91-134-Civ-J-16 (M.D. Fla. filed Nov. 30, 1993).

[13] United States' Amendment to Objections to Discovery Order Dated November 9, 1993, at 2, in *Burr*, No. 91-134-Civ-J-16 (M.D. Fla. filed Dec. 9, 1993).

[14] *See* Order of 1-4-94, at 6-7, in *Burr*, No. 91-134-Civ-J-16 (M.D. Fla. Jan. 4, 1994). *See also United States ex rel. McCoy v. California Med. Review, Inc.*, 133 F.R.D. 143, 148-49 (N.D. Cal. 1990) (holding that a relator is entitled to discovery in aid of objections to a settlement).

In short, the experiences of BCBS Member Plans and other health insurers demonstrate the practical consequences of the constitutional deficiencies identified in the petition for a writ of certiorari. These consequences include the costs of investigating and defending meritless lawsuits, the unnecessary transformation of legal disputes into "fraud" cases, wasteful satellite litigation over the relator's rights vis-a-vis the Government, and unnecessary disruption of federal programs.

II. THE CONSTITUTIONALITY OF THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT IS AN ISSUE OF WIDESPREAD IMPORTANCE TO THE HEALTH CARE INDUSTRY AND TO THE GENERAL PUBLIC

The practical vices of *qui tam* litigation are amplified by its extraordinarily broad sweep in the heavily regulated health care field. *Qui tam* lawsuits have involved not only health insurers but many other providers of medical goods and services. The Inspector General of the Department of Health and Human Services ("HHS"), testifying before Congress in 1990, gave the following examples of other *qui tam* cases that had already been brought involving the health care industry:[15]

- Actions against medical manufacturers and pharmaceutical companies which allegedly

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[15] False Claims Act Implementation: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 39-40 (1990) (prepared statement of Richard P. Kusserow, Inspector General, Department of Health and Human Services).

submitted false and fraudulent statements and evidence in applications to the Food and Drug Administration.

- Cases against a Health Maintenance Organization and various physicians for allegedly billing Medicare for non-covered services.
- Allegations against a mobile medical diagnostic company for alleged false billing.
- Lawsuits involving alleged falsification of research data and misrepresentation in connection with federal biomedical research grants.
- Cases against Professional Review Organizations responsible for ensuring that inpatient hospital services provided to Medicare beneficiaries are medically necessary and of good quality.

Moreover, as the Inspector General observed, there has been a "geometric progression" in the number of such health care *qui tam* cases referred to HHS for investigation, a trend which he predicted would continue "as the general public and the legal community become increasingly aware of the *qui tam* provisions of the False Claims Act."[16] Indeed, "HHS is second only to the Department of Defense in the number [of] *qui tam* cases that have been filed."[17]

This trend is virtually certain to continue for the foreseeable future. Congress, public interest groups, and the plaintiffs' bar have all affirmatively expressed an

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[16] *Id.* at 37.

[17] *Id.*

intent to increase the use of *qui tam* litigation in the health care field.[18] Moreover, "the growth in federal disbursements for health care suggests increased *qui tam* opportunities involving reimbursement and service-delivery programs administered by the Health Care Financing Administration (Medicare and Medicaid), Veterans Affairs (veterans hospitals), Department of Defense (CHAMPUS, military hospitals), Indian Health Service (reservation clinics), Bureau of Prisons (correctional infirmaries), Office of Personnel Management (civil service health insurance), and the like."[19] One commentator suggests that future *qui tam* actions could even be brought for poor quality medical services, *i.e.*, as a type of federal malpractice claim not subject to traditional tort defenses.[20]

The constitutionality of the *qui tam* provisions of the False Claims Act is thus a matter of great importance to the entire health care industry. *Qui tam* litigation will increasingly place a financial burden on the industry and consume the scarce resources of the Department of Justice, HHS, and the Medicare program. Ultimately, the general public, which pays for health care through taxes and private payments, will bear most of these costs.

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[18] *See id.* at 84-85; Pet. at 26.

[19] David C. Hsia, *Application of Qui Tam to the Quality of Health Care*, 14 J. Legal Med. 301 (1993).

[20] *Id.* at 310. Indeed, the opportunities to employ *qui tam* in the health care field will be even more greatly multiplied if the involvement of the government in the delivery and financing of health care services is expanded to the degree contemplated by some current legislative proposals. *See, e.g.*, The Health Security Act, S.1757, 103d Cong., 1st Sess. (1993).

Proponents of *qui tam* argue that its ills are justified by the greater good of detecting and deterring fraud against the United States. This argument fails for a number of reasons. *First*, experience shows that a very high proportion of *qui tam* lawsuits are meritless. *Second*, with respect to those *qui tam* cases that the Government considers to have merit, the Government often maintains that the cases would have been brought even in the absence of *qui tam*.[21] *Third*, virtually all of the alleged benefits of *qui tam* could be achieved, without offending the Constitution, simply by providing a financial incentive for individuals with information regarding fraud to provide this information to the Government. Moreover, even if evidence showed that *qui tam* provided a net economic benefit (which it does not), this benefit would not justify the harm that *qui tam* is doing to constitutional liberties and to the tripartite structure of government. *See INS v. Chadha*, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.").

This Court's immediate review of the constitutionality of the *qui tam* provisions of the False Claims Act would be of great benefit to the health care industry and

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[21] *See* False Claims Act Technical Amendments of 1992: Hearing on H.R. 4563 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 102d Cong., 2d Sess. 19-21 (1992) (prepared statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, U.S. Department of Justice) (discussing problem of "parasitic lawsuits").

the public. In view of the fact that most *qui tam* cases are either dismissed or settled (or, as in the *Provident* case, both), it is unlikely that the constitutional issues will in the near future again be squarely presented for the Court's review as in this case. In the absence of such review, parties will continue to litigate *qui tam* cases without the benefit of the Court's guidance on the constitutional issues. Furthermore, if, as BCBSA believes, the *qui tam* provisions are in fact unconstitutional, the Court's review will prevent the unnecessary expenditure of time and money by the lower courts, the Government, and *qui tam* defendants, and will avoid embroiling Congress and the courts in the litigative decisions properly within the discretion of the executive branch.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition for a writ of certiorari, BCBSA respectfully submits that the petition should be granted.

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No. 93-817

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE BOEING CORPORATION,
Petitioner,
v.
UNITED STATES EX REL. KELLY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* ROCKWELL INTERNATIONAL CORPORATION, LITTON INDUSTRIES, INC., AND NORTHROP CORPORATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Rockwell International Corporation, Litton Industries, Inc., and Northrop Corporation hereby move for leave to file the attached brief as *amici curiae* in support of petitioner. Petitioner has consented to the filing of this brief, but respondent has not consented.

Movants obtain a significant portion of their revenue under contracts with the United States government to supply various military products. Movants have been frequent targets of litigation under the False Claims Act brought by *qui tam* relators. Collectively, movants have been named as defendants in 25 cases brought by *qui tam* relators in which the government has declined to intervene. Movants have expended over $21.6 million

to defend themselves in such lawsuits. Movants expect that this costly barrage of litigation by *qui tam* relators will continue.

Because movants have been unwillingly involved in such a large number of lawsuits brought by *qui tam* relators, movants have unique insights into the practical problems engendered by the lack of Executive Branch control over such litigation. These insights will aid the Court in deciding whether to examine the constitutional issues presented by the petition.

In the proposed brief attached hereto, *amici* would explain why Executive Branch control over litigation instituted on behalf of the United States is a central requirement of the separation of powers. *Amici* further would explain the respects in which the Executive Branch lacks such control over *qui tam* litigation. In particular, *amici* would describe the lack of Executive Branch control over whether and where to initiate cases under the False Claims Act, the lack of control over the conduct of such cases, and the lack of control over their termination. *Amici* further would describe, based on their own experiences, how the absence of such control has adversely impacted the rights of private parties such as the *amici*, as well as the interests of the government.

Accordingly, movants respectfully request the Court to grant their motion for leave to file the attached brief as *amici curiae*.

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BRIEF OF ROCKWELL INTERNATIONAL CORPORATION, LITTON INDUSTRIES, INC., AND NORTHROP CORPORATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

Rockwell International Corporation, Litton Industries, Inc., and Northrop Corporation each obtain a significant proportion of their revenue under contracts with the United States government to supply various military products. *Amici* collectively have been named as defendants in 25 lawsuits brought by *qui tam* relators under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq.*, in which the government has declined to intervene.

Reductions in funding for military programs have forced *amici* to lay off significant numbers of employees. *Qui tam* lawsuits typically are brought by disgruntled employees or former employees. *Amici* anticipate that they will continue to be targeted as defendants in *qui tam* litigation unless this Court holds the *qui tam* provisions of the FCA unconstitutional.

SUMMARY OF ARGUMENT

Since the 1986 Amendments to the FCA made it easier and more lucrative for relators to pursue *qui tam* cases, such lawsuits have become a plague upon the defense industry. During those seven years, the *amici* filing this brief expended over $21.6 million in defending *qui tam* lawsuits in which the government did not intervene. By contrast, from 1986 through 1991 the federal treasury received a total of only $225,000 from *all* cases where the relator proceeded without the government. Prepared Statement of Assistant Attorney General Stuart M. Gerson, *Hearings before the Subcommittee on Civil and Constitutional Rights, Judiciary Committee, U.S. House of Representatives*, 102d Cong., 2d Sess., at 6 (April 1, 1992) ("Gerson Statement").

Qui tam litigation is brought in the name of the government, and seeks to recover claims and penalties that belong to the government, yet the government lacks effective instruments of control over such litigation. The *qui tam* lawsuits authorized by the FCA are unique in that the FCA leaves the government without the power either to control the conduct of counsel acting in its name or to decide whether, when and how to control the government's interest in its own claims.

When the claim asserted by the *qui tam* relator arises out of a contractual relationship between the government and a contractor, the relator's unbridled discretion in initiating and pursuing the action can drive a wedge between the government and its contracting partner. *Qui tam* lawsuits prevent the government as a contracting party from controlling when the government as a litigant (embodied in the *qui tam* relator) claims that the contract has been breached. Government contractors can no longer trust that the decision of a contracting officer with respect to a disputed issue will be final.

Although not every breach of contract should give rise to an FCA violation, there is no realistic protection against frivolous *qui tam* lawsuits. On the one hand, a relator has an enormous incentive to construct an argument that the contractor has committed some breach of the contract, that the contractor's claim for payment was therefore fraudulent, and that the relator should recover 30 percent of the contract price of the entire defense system. On the other hand, there is no effective deterrent even to baseless suits. Although the *qui tam* relator is theoretically subject to a claim for attorney's fees for bringing a frivolous action, this threat does not discourage relators with few assets, especially when compared to the huge potential upside of a fluke victory or the attactive prospect of a "strike suit" settlement.

The stakes in *qui tam* cases are enormous. Relators' suits commonly involve weapons programs for which the

defendant has been paid tens or hundreds of millions of dollars. Penalties under the FCA include treble damages, plus attorney's fees, plus between $5,000 and $10,000 per false claim. Relators have invented outlandish theories of what constitutes a "claim" for payment so as to inflate the penalties even beyond the amount of actual damages.

The prospects of multi-million dollar recoveries, the small downside risk of suing, and the lack of effective control by the Executive Branch have led to an intolerable state of affairs. Relators bring suits that the government would not bring, and pursue cases in a manner that the government would not pursue them. This harms both defendants, such as the *amici*, and the government itself.

The Court should consider the important constitutional issues raised by the Petition for Certiorari in this case now. Delay would only produce further burdensome expense for the defense industry, with little gain for the government.

ARGUMENT

I. THE UNCONSTITUTIONAL LACK OF EXECUTIVE CONTROL IN THE APPOINTMENT AND SUPERVISION OF *QUI TAM* LITIGATION HAS RESULTED IN GRAVE AND RECURRENT THREATS TO PRIVATE RIGHTS.

A. Executive Control Over The Initiation and Pursuit of Litigation Is Constitutionally Required.

The *qui tam* relator prosecutes a case in the name of, and on behalf of, the United States. The power to initiate and pursue litigation on behalf of the United States has always been understood to be a function reserved to the Executive Branch of our government. *See Buckley v. Valeo*, 424 U.S. 1, 128 (1976); *United States v. Nixon*, 418 U.S. 683, 693 (1974). The irreducible core of this principle is that suit cannot be maintained in the name of the United States contrary to the policies of the Executive Branch that manifest the President's duty to "take

Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3.

This is why the Court in *Morrison v. Olson* permitted Congress to impose some restrictions on that Executive prerogative *only* when the restrictions leave the Executive with "sufficient control" over the litigation "to ensure that the President is able to perform his constitutionally assigned duties." 487 U.S. 654, 696 (1988). The Court in *Morrison* applied this criterion in rejecting the separation of powers challenge to the Ethics in Government Act. Central to the Court's reasoning was its observation that the Attorney General ("AG") retained the following means of supervising and controlling the Independent Counsel ("IC"):

- The AG has the power to *initiate* an investigation.
- The AG's decision not to request the appointment of an IC is unreviewable, and no IC may be appointed unless the AG so requests.
- The AG has the power to define the *scope* of the investigation. The IC's jurisdiction is defined with reference to the facts submitted by the AG.
- The AG retains some control over the IC's *continuing activities.*
  - The IC must follow the policies of the Department of Justice ("DOJ") unless it is not possible to do so.
  - The AG can remove the IC for good cause.

See id.

These aspects of Executive control over the initiation and conduct of litigation on behalf of the United States are essential not only for the preservation of the powers of the President, but also for the protection of individual rights.

B. Essential Attributes Of Executive Control Are Absent Under The FCA.

The FCA delegates to self-appointed private parties the right to bring an enforcement action, a power which

Buckley reserved to the Executive Branch. The FCA deprives the Executive of the very powers of control that *Morrison* held to be essential to the constitutionality of the Ethics in Government Act:

- The *qui tam* relator is self-appointed. *See* 31 U.S.C. § 3730(b).
- The *qui tam* relator decides whether and when to initiate a case. *See id.*
- The *qui-tam* relator is not bound by the policies of the DOJ.
- The *qui tam* relator solely controls the scope of the case, and has every incentive to make the theory of the case as broad as possible. *See id.* and discussion at p. 11, *infra.*
- The *qui tam* relator may not be removed by the Attorney General or a court, even for good cause. *See* § 3730(c)(1)-(3).

Unlike the IC, therefore, the *qui tam* relator is free of any significant control by the Executive. The FCA establishes no controls to ensure that a *qui tam* relator accords private parties the protections that would result from Executive control. To the contrary, the *qui tam* relator is not politically accountable and has a direct and personal incentive to pursue cases under the FCA to the maximum extent possible. This regime is not only theoretically prone to abuse of private rights, but as shown in the following section, has actually resulted in such abuse.

C. The Practical Consequences Of The Lack Of Executive Control Over *Qui Tam* Litigation Under The FCA Pervade And Distort What Should Be Government Litigation.

1. *The* Qui Tam *Relator's Control Over The Initiation Of Litigation.*

The ability to decide whether and when to institute an action on behalf of the government is central to the Executive's authority to enforce the law. *Heckler v.*

Chaney, 470 U.S. 821, 832 (1985). The Ethics in Government Act preserves this power at the threshold due to the AG's unreviewable authority to decide whether to initiate a preliminary investigation and whether to apply for appointment of an IC. Even after the IC is appointed, the AG retains indirect control because the IC is required to follow DOJ enforcement guidelines.

Under the FCA, however, the *qui tam* relator has unrestrained authority to bring an action and the Executive cannot prevent the relator's institution of suit. *See* Blanch, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 Harv. J. L. Pub. Pol. 701, 756 (1993) (Student Note). Under the FCA, the *qui tam* relator may file suit without advance authorization from or even notification to the government. 31 U.S.C. § 3730 (b)(1). *After* the complaint is filed, the *qui tam* relator must supply the government with a copy of the complaint and all material information and evidence the relator possesses. *Id.* § 3730(b)(2). At that point, the existence of the relator's suit is a *fait accompli*. The government's choices are limited to intervening to pursue the case, or declining to intervene and allowing the relator to pursue the case on his or her own. *Id.* § 3730(b)(4).

As a result, the *qui tam* relator can institute suit under the FCA in circumstances in which the Executive would decide that the national interest would be better served by not suing, or by suing at a later date. Some examples follow.

- *National Security.*

The relator's institution of suit may implicate national security interests. For example, the relator may allege that the defendant has falsely certified that certain performance criteria have been satisfied in connection with a classified weapons program. Resolution of that claim may require discovery and disclosure of the performance criteria in question, which could undermine the nation's interest in preserving the secrecy of such information. The government may have decided that the nation's secur-

ity is more important than the alleged fraud, particularly if the government's subsequent experience with the weapons system has demonstrated that the performance criteria have been satisfied or exceeded. The relator, however, is interested in his or her own financial gain, and is not concerned with these broader national interests. *Cf.* Caminker, *The Constitutionality of Qui Tam Actions,* 99 Yale L.J. 341, 365 & n.121 (1989).

• *Criminal Investigations.*

The relator's institution of suit may undermine an ongoing criminal investigation. The FCA allows the government to ask the court to stay discovery in the *qui tam* case for 60 days by showing that discovery would interfere with the government's investigation or prosecution of a criminal or civil matter. 31 U.S.C. § 3730(c)(4). In order to extend the 60-day stay, the government must show that it has pursued the investigation or proceedings with "reasonable diligence." *Id.* This standard was intended to restrict significantly the government's ability to delay the *qui tam* suit. *See* S. Rep. No. 345, 99th Cong., 2d Sess., at 25 (1986) ("the court should carefully scrutinize any additional government requests for extensions by evaluating the government's progress with its criminal inquiry"). In several cases, district courts have refused to grant the government's requests for extensions sought to avoid interference with criminal investigations. *See Constitutionality of the Qui Tam Provisions of the False Claims Act,* 13 Opp. Legal Counsel 249, 1989 WL 418317, *9 (1989) ("Barr Op.").

The relator's pursuit of the case may alert potential criminal targets to the existence of a criminal investigation, and may disclose key information including the government's litigation strategy. *See id.*; Gerson Statement at 8. In addition, the existence of the *qui tam* suit may impair the government's ability to negotiate a comprehensive settlement of civil and criminal charges. *See id.*

• *Alternative Remedies.*

The relator's initiation of suit under the FCA may prevent or impair the government's ability to resolve the dispute with the defendant informally or on terms that are better suited to the nature of the conduct at issue.

The relator may claim, for example, that the defendant has incorporated product components different from those specified in the contract. In such a case, the relator could allege that the defendant made a claim for payment under the contract knowing that it had not complied with the precise terms of the contract, and therefore in violation of the FCA. In this way, the relator may attempt to turn even a minor breach of contract into a lawsuit claiming treble damages and $10,000-per-occurrence penalties. The fact that the substituted component actually works *better* than the one specified in the contract is of no import to the relator.

The government, however, may evaluate such a case quite differently. The government may recognize that the defendant has committed a technical breach of the contract, but may view that breach as minor. The government may determine that the government's interest would be better served by overlooking this breach, or by resolving the issue through informal discussions.[1] The government is likely to take this view when the basic intent of the contracting parties has been met, despite the defendant's technical breach. This is particularly true when the government has a strong interest in preserving a useful course of dealing with the defendant, as where the defendant is one of a limited number of parties qualified to supply specialized military products. *See* Barr Op. at *11.

Relators' pursuit of this type of case likely will adversely affect relations between the government and contractors. A contractor may be less likely to disclose to the govern-

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[1] *See* 5 U.S.C. §§ 571 *et seq.* (facilitating alternative dispute resolution for disputes involving government).

ment a mistake or the substitution of a component if the contractor knows that the approval of a government representative cannot be relied upon, and that a *qui tam* lawsuit could be brought. This result undermines the government's efforts to encourage informal working partnerships between the contracting agencies and defense contractors. Similarly, a government representative may be less likely to overlook or compromise a mistake or to allow a product substitution when that decision will be examined and second-guessed by a relator and a court after the fact. The result is that contractors and the government are likely to be less forthcoming and more rigid in their dealings, undermining the efficient management and administration of government contract programs. *See id.*

- *Prosecutorial Discretion.*

Relators initiate lawsuits under the FCA in cases where the government, in the exercise of prosecutorial discretion, would decline to bring suit. The relator may sue a deep-pocket company in a case in which the government would decline to sue because the company has fired the individual responsible for the wrongdoing, *see* Barr Op. at *9, or because the company has taken satisfactory corrective action including voluntary restitution to the government.

United Sta ex rel. Rohan v. Newbert, No. 92-55546 (9th Cir.), i e of many examples. In *Rohan*, a Litton employee embezzled funds from the Company. When the government alerted Litton to this conduct, Litton cooperated with the government agents in gathering information that was used in a successful criminal prosecution of the employee, and Litton made necessary accounting adjustments so the government did not bear the loss of the embezzled funds. The government chose to take no action against Litton, given that Litton was the victim of the embezzlement, had cooperated in the investigation, and had taken satisfactory corrective action. Another former Litton employee, however, brought a *qui tam*

claim against Litton based on each claim for reimbursement to the government that incorporated the embezzled amounts. Litton prevailed on a motion for summary judgment and on appeal, but only after expending a large amount of money and time defending a suit that never should have been brought. Had the government been able to exercise its prosecutorial discretion, the case would not have been filed.

Another factor influencing prosecutorial discretion is whether the facts of the case are well-suited to litigating novel legal principles. The government may decide that the facts frame the legal issue in a way that is likely to produce an unwelcome precedent, and therefore may choose to await another case in which to attempt to establish the principle. The relator, however, lacks this broad view. This problem is compounded by the fact that counsel for the relator may be less qualified to advocate these legal positions. Accordingly, relators' prerogative to institute suit may produce a body of law that undermines the government's continuing interests.

• *Claims the Relator Cannot Prove.*

A government prosecutor is to refrain from pursuing a case that is not supported by probable cause. ABA Model Rules of Professional Conduct, Rule 3.8.[2] A relator, however, does not operate under such constraint.

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[2] Although the ABA Rule specifically addresses criminal cases, it articulates considerations applicable to all enforcement actions brought in the name of the government, whether criminal or civil. Moreover, this Court has held that the extraordinarily harsh remedies authorized by the False Claims Act can constitute "penalties" under the Double Jeopardy Clause, *United States v. Halper*, 490 U.S. 435 (1989), and other courts similarly have determined that the Act should be viewed as a criminal or penal statute. *United States v. Bornstein*, 423 U.S. 303, 313 n.8 (1976) (False Claims Act must be construed as " 'the provisions of a criminal statute [and] [s]uch provisions must be carefully restricted' " (citation omitted)); *United States ex rel. Brensilber v. Bauch & Lomb Optical Co.*, 131 F.2d 545, 547 (2d Cir. 1942) (False Claims Act "is not only penal, but drastically penal"), *aff'd per curiam*, 320 U.S. 211 (1943).

A relator may file suit even when the prospects for success are small, because the recovery if that chance materializes is so large. Even if the relator knows that the case is weak, he or she may file suit in the hope of surviving motions and reaching a jury—because who knows what an inflamed jury might award? This is not, and should not be, the manner in which the government decides whether to bring an enforcement action under a penal statute such as the FCA. Moreover, there is no effective deterrent even to baseless suits by *qui tam* relators. The threat of sanctions for a frivolous action is not taken seriously by most relators, who have few assets with which to pay such an award. Compared to the tantalizing prospect of a huge recovery or even a nuisance settlement, the availability of such sanctions is not an effective check on baseless lawsuits.

In addition, relators frame the allegations of their complaints as broadly as possible in order to maximize potential recovery. *See* Gerson Statement at 18 (referring to the "uncomfortable number" of " 'kitchen sink' complaints containing every conceivable broad allegation without any specific evidence whatsoever"). Such blunderbuss pleading is dangerous not only because it introduces baseless claims, but also because it encompasses (sometimes accidentally) potentially valid claims that the relator is unable to prove. Because any settlement or judgment will bind the government as a matter of *res judicata* even when the government does not intervene, relators' interest in expansive allegations can foreclose the government's future ability to pursue legitimate claims. *See* Barr Op. at *10.

Defendants typically win these baseless lawsuits, but at great cost in terms of money and time. Defendants still must hire counsel, investigate the facts, file motions, and sometimes engage in discovery. Even when the case is frivolous, the stakes are enormous, and defendants must take seriously any case brought under the FCA. As a result, an inordinate amount is spent on litigation that would be avoided if the government were in control of the initiation of lawsuits under the FCA. As mentioned

above, the *amici* filing this brief have collectively spent over $21.6 million on legal fees defending cases brought by *qui tam* relators in which the government has declined to intervene.

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The government could attempt to prevent relators from proceeding with some of these types of cases by intervening and requesting dismissal at the outset of the case. Under the FCA, however, the government must obtain court approval to dismiss. *Id.* § 3730(c)(2)(A). The relator can oppose the government's motion, leaving the court to decide which "representative" of the government should prevail. The relator can thereby force a case to go forward even when the government asks that it be dismissed.

This procedure, moreover, is not an effective substitute for the government's traditional prerogative to decide whether to *bring* suit. When the government declines to initiate suit because the evidence is ambiguous, because of countervailing government interests, or because of the cooperation of the potential defendant, it need not articulate or defend these reasons outside of the Executive Branch. It is quite a different matter for the government to *justify* in a public forum the dismissal of a case that already has been brought in its name. In order to request dismissal, the government must be willing to expend significant resources to engage in an adversary proceeding with a relator. It also must be willing to subject its prosecutorial reasoning to public scrutiny. Many in Congress and the press are of the view that every allegation of fraud on the government should be pursued with extreme vigor. These individuals are poised to attack the Executive upon the slightest indication that the pursuit of fraud claims is being cut off.

The government almost never moves to dismiss cases that it would not have brought in the exercise of its discretion. The government frequently has declined to intervene to request dismissal, even in cases where the

government has found "insufficient evidence" to support the allegations of the complaint.[3] Indeed, in the seven years since the amendments expanding the FCA, *amici* are aware of only one case in which the government has intervened and requested dismissal.[4]

2. *The* Qui Tam *Relator's Control Over The Forum.*

The FCA authorizes *qui tam* relators to bring suit in an appropriate District Court. 31 U.S.C. § 3730(b). In many instances, this undermines the statutory regime for resolution of government contract disputes by the Boards of Contract Appeals and the United States Court of Federal Claims. These are expert forums specifically designated to consider and decide issues of public contract interpretation. 41 U.S.C. §§ 606, 609. Appeal from both the Boards of Contract Appeals and from the Court of Federal Claims is to the Court of Appeals for the Federal Circuit. *Id.* § 607(g); 28 U.S.C. § 1295(a)(3). The statutory scheme is designed to ensure expertise in the adjudicative bodies and uniformity in the development of public contracts law.

The FCA, however, undermines this carefully designed statutory scheme by permitting relators to bypass the administrative mechanism and bring suit directly in District Court. The defendant and the government thereby are deprived of the benefit of the expertise of the Boards of Contract Appeals and the Court of Federal Claims. District Courts, which seldom deal with government contract disputes, are more likely to decide them in a manner at variance from the intentions and practices of the defendant and the government. In addition, District Courts in different jurisdictions may decide similar contract disputes in different ways, thus producing conflicting decision-

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[3] *See* DOJ Press Release No. 88-513 (regarding *United States ex rel. Stillwell v. Hughes Helicopter Co., Inc., et al.*)

[4] *Juliano v. Federal Asset Disposition Ass'n*, 736 F. Supp. 348 (D.D.C. 1990). There, the government intervened to request dismissal only of a federal governmental agency and individuals acting in their official capacity.

making that is particularly inappropriate for government contracts.

If the *qui tam* provisions of the FCA did not exist, the Executive would weigh these considerations against the appropriateness of seeking recovery under the FCA in each case. The relator, however, has no interest in these competing factors, but desires only to obtain the greatest and fastest monetary recovery. Although the government may pursue administrative or other remedies while the *qui tam* action is pending, 31 U.S.C. § 3730 (c)(5), the statute does not require the *qui tam* suit to be stayed in the meantime.

3. *The* Qui Tam *Relator's Conduct Of The Case.*

Once the government declines to intervene in a case instituted by a *qui tam* relator under the FCA, the government is unable to control the relator's day-to-day management of the case. "If the government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action." 31 U.S.C. § 3730(c)(3). The lack of Executive control over the conduct of the litigation brought on behalf of the government produces serious problems for both the government and private defendants.

The relator is free to adopt legal positions in the litigation that are at odds with the positions that the Executive has taken or would take. For example, the relator may advocate an interpretation of a term of a contract between the defendant and the government that is contrary to the view taken by both the defendant and the government. *See, e.g., United States ex rel. McCoy v. Seaward Marine Services, Inc.*, 1992 U.S. App. Lexis 17979 at *10-11 (4th Cir. 1992). The defendant in such cases is required to finance the defense of a case brought on a theory that both contracting parties agree is unfounded.

Alternatively, the relator may put forth a view of the contract that the government has not considered. The relator's advocacy of such positions in the litigation (e.g.,

in responses to interrogatories or requests for admission) could be argued to *bind* the government with respect to the future administration of this and similar contracts. At a minimum, the defendant that continues to pursue a conflicting contractual interpretation is at peril of continuing liability. Moreover, the court or a jury will decide whether the relator's view of the meaning of the contract is correct. This resolution will bind the government and the contractor through the operation of *res judicata*. *See* S. Rep. 345, 99th Cong., 2d Sess. 27; Barr Op. at *8. Accordingly, private parties and the government may be required to modify the administration of the contract, even though that result was not intended and is not desired by either of the contracting parties, because of the relator's intermeddling.

The government lacks any effective means of controlling these abusive tactics by relators. The government's ability to file *amicus* briefs in support of defendants' positions is not an effective remedy. In order to participate in this manner, the government would be required to conduct a detailed review of all pleadings filed by every relator. Government attorneys would be required to attend all court hearings and trials at which relators' counsel might make arguments with which the government disagrees. The government simply lacks the resources to monitor *qui tam* litigation in this manner. Indeed, the lack of government resources was used in Congress to justify expansion of the *qui tam* provisions in 1986. Finally, even when the government does participate as *amicus*, the court may reject the views expressed by the Executive and adopt those advocated by the relator. This result would be avoided if the Executive and the defendant were the only parties to the litigation.

As a more extreme measure, the government could move to intervene if it recognizes that the relator's management of the case threatens the government's interests. Yet this course of action also is ineffective. The statute only authorizes the government to ask the court to limit the realtor's participation when it is repetitious, irrelevant,

or for purposes of harassment, as for example by limiting the number of witnesses, limiting the length of testimony, or limiting cross-examination. 31 U.S.C. § 3730(c)(2)(C). There is *no* provision permitting the government to ask the court to limit the *legal* arguments that the relator can assert.

Conceivably, the government could move to intervene and to dismiss the case, but this is even more unlikely than intervention and dismissal at the outset of the case. Moreover, when the government elects not to intervene at the outset of the litigation, the court may permit the government to intervene later "without limiting the status and rights of the person initiating the action." § 3730(c)(3). It has been argued that this provision means that the government cannot later intervene for the purpose of dismissing the action. *See* Blanch, *supra*, 16 Harv. J. L. Pub. Pol. at 708.

Relators' control over the management of litigation can produce adverse effects apart from the advocacy of legal positions contrary to those that are or would be asserted by the government. Relators often demand to obtain the government's investigative files and to interview or depose the government's investigators and other witnesses. Such conduct interferes with the government's investigative process, and diverts the valuable time and attention of government employees. *See* Barr Op. at *10. In addition, relators without required clearances may demand the production of classified documents, compromising the government's interest in preserving the secrecy of such material.[5]

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[5] For example, in *United States ex rel. Truong v. Northrop Corp.*, CV 88-967 MRP (C.D. Cal.), a *qui tam* case in which the government declined to intervene, the Court ordered Northrop to produce certain documents to the relator, including classified materials. Thereafter, an Air Force officer wrote to Northrop to advise of "Northrop's obligation under the contract and the law to not turn over classified information or documents." *See also United States ex rel. Grand v. Northrop*, No. C-1-91-222 (S.D. Ohio), where the government moved to intervene to ask for reconsideration of the

Relators have gone much further in their "discovery" efforts. Some employee-relators have stolen confidential documents from the defendant for use in the litigation (and claimed that such conduct was protected by the whistleblower provision of the FCA, 31 U.S.C. § 3730(h)). Such conduct in furtherance of an action "for the United States government," § 3730(b), would not be countenanced by the government.

4. *The* Qui Tam *Relator's Control Over The Termination Of Litigation.*

Qui tam relators' control over the termination of litigation under the FCA also reflects the unconstitutional evisceration of Executive control, and produces severe practical consequences for private defendants.

Neither the relator nor the government has the ability unilaterally to settle a case under the FCA. A defendant cannot settle the case with the relator alone. The government must be advised of the settlement, and may object to it. The FCA provides that a case brought by a relator under the FCA canont be dismissed without the consent of the court and the AG. 31 U.S.C. § 3730(b)(1). On the other hand, a defendant cannot settle with the government alone. A settlement between the defendant and the government is not effective unless the relator's objections are heard and the court finds that the settlement is "fair, adequate, and reasonable." 31 U.S.C. § 3730(c)(3)(B). Court approval, moreover, is not a foregone conclusion where the relator claims the settlement is inadequate. In *Gravitt v. General Electric Co.*, 680 F. Supp. 1162 (S.D. Ohio), *cert. denied*, 488 U.S. 901 (1988), for example, the court disapproved a settlement between the government and the defendant (which the relator had opposed) because it found the government's investigation to be inadequate. A few years and many litigation dollars

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Court's order that Northrop produce classified documents to the *qui tam* relator.

later, the case settled for the same figure. *See* Barr Op. at *10.[6]

As a practical matter, therefore, the structure of the FCA requires the defendant to negotiate a settlement with both the government *and* the relator. This is often extremely difficult, because the interests of the government and the relator directly conflict. The defendant typically is willing to pay a fixed sum to settle the case, but is indifferent as to how that sum is allocated. The government wishes to maximize recovery to the federal Treasury by minimizing the recovery of the relator, and therefore argues that the payment is mostly attributable to the government's claims. The relator, on the other hand, wishes to maximize his or her personal recovery, and therefore argues that a large portion of the payment is attributable to his or her "personal" claims, such as claims for workplace harassment under 31 U.S.C. § 3730 (h), or for attorney's fees.[7] The defendant is caught in this crossfire. The result is cases in which all parties agree on the sum the defendant should pay to settle, but the case cannot settle because the parties disagree on how it should be allocated. This problem is even more severe where the government asserts the right to veto a settlement between the defendant and the relator without actually intervening to take over the pursuit of the case. In that situation, neither the defendant, nor the relator,

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[6] The requirement of court approval of a settlement between the government and a private party is itself an unconstitutional restriction on Executive authority. The *qui tam* relator brings a claim on behalf of the government. The government, as the owner of the claim, should have the prerogative to settle it with the defendant. The FCA's restriction of the Executive's prerogative to settle its own claims creates an unprecedented judicial intrusion into the President's judgment. *See* Barr Op. at *10 & n.7.

[7] *See* Gerson Statement at 22 (reporting that, while the federal Treasury has received only $225,000 in connection with *qui tam* cases in which the DOJ has declined to intervene, private plaintiffs have structured settlements so that they and their attorneys have received, or have requested the DOJ to approve, more than $6.1 million in additional payments).

nor the government wish to pursue the case, but the case cannot settle.[8]

II. THE COURT SHOULD CONSIDER THESE IMPORTANT CONSTITUTIONAL QUESTIONS AT THIS TIME.

This case presents an unusual opportunity for the Court to address the important constitutional defects of the FCA. The Court may not soon have another such opportunity, because few *qui tam* cases reach the Courts of Appeals. Most cases brought by relators are won by defendants, or are settled before trial. *See* California Lawyer, December 1993, at 40 (comments of Stuart Gerson).

If the Court were to decline to grant the writ in this case, the delay in this Court's resolution of the constitutional issues would harm the public greatly. As noted above, there are significant costs in terms of money and time of defending cases brought by relators under the FCA. In contrast to these significant costs imposed by *qui tam* litigation under the FCA, the benefits to the federal Treasury are minimal. From 1986 through 1991, there were about 265 *qui tam* cases in which the government declined to intervene. *See* Gerson Statement at 19. The federal Treasury has received only $225,000 in all of these cases combined, or less than $1,000 per case on average. *Id.* at 6. This compares to $150 million recovered in *qui tam* cases in which the government has intervened, and over $1 billion in total fraud recoveries. *Id.* at 7.

The adverse effects resulting from the lack of Executive control over the initiation and conduct of litigation under the FCA are particularly severe in the wake of layoffs resulting from the restructuring of the defense industry. Former employees often are left without ready job prospects, and are easily tempted by the prospect of a big judgment against their former employers. Plaintiffs'

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[8] *See United States ex rel. Killingsworth v. Northrop Corp.*, No. 93-55863 (9th Cir.)

attorneys are ready to exploit this market. These attorneys are turning increasingly to the FCA as a lucrative adjunct to traditional wrongful termination claims, particularly in light of the restrictions imposed by State courts on tort recove y for employment terminations. In short, *qui tam* claims are booming in proportion to the contraction of the defense industry.

The Ninth Circuit's ruling in this case, unless reviewed by this Court, will definitively foreclose this constitutional challenge to *qui tam* litigation under the FCA in all cases brought in West Coast states. Because many defense contracto s (including each of the *amici*) have a major presence on the West Coast and have laid off many employees in those states. the effect of the Ninth Circuit's ruling is severe. It will require the defense industry to spend millions of dollars defending cases brought under an unconstitutional provision. These are cases that would not have been brought or pursued if the FCA permitted the degree of Executive control over this type of litigation that the Constitution requires.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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